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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-96

No. ~~1454~~

PHILIP J. PICARD,
PETITIONER,

v.

JAMES J. CONNOR,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FILED MARCH 10, 1971

CERTIORARI GRANTED MAY 3, 1971

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UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

No. 7537

JAMES J. CONNOR,
PETITIONER,

v.

PHILIP J. PICARD,
as he is Superintendent of the
Massachusetts Correctional Institution, Norfolk,
RESPONDENT.

DOCKET ENTRIES

PROCEEDINGS	
1970	
Feb. 12	Record on appeal in one volume filed and case docketed.
Feb. 24	Appearance of James J. Twohig for appellant filed. Motion filed. Order (Aldrich, Ch.J.) enlarging the date for filing statement and designation to and including April 21, 1970. Notice mailed.

1970

Feb. 25 Appearance of Lawrence P. Cohen, for the appellee filed.

Apr. 21 Statement and designation filed. Motions filed. Order (Aldrich, Ch.J.) granting leave to the parties to proceed on the original papers without reproduction in appendix form. Order (Aldrich, Ch.J.) enlarging the time for filing brief for appellant to and including May 21, 1970. Notices mailed.

May 21 Motion, assented to, filed. Order (Aldrich, Ch.J.) enlarging the time for filing brief for appellant to and including May 28, 1970. Notices mailed.

May 28 Typewritten brief for appellant filed.

June 23 Brief for appellee filed.

Aug. 31 Assigned for hearing at the coming September 1970 session.

Sept. 11 Heard before Aldrich, McEntee and Coffin, JJ

Sept. 22 Supplemental memorandum filed by respondent pursuant to leave granted at oral argument.

Dec. 10 Judgment: The judgment of the district court dismissing the petition for a writ of habeas corpus is vacated and the case is remanded to that court with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth. No costs. Opinion by Aldrich, Ch. J. Notices mailed.

Dec. 31 Mandate issued; copy filed. Original papers returned to the district court.

1971

Feb. 12 Motion to recall mandate etc., filed. Order (Murray, D.J.) recalling mandate and staying District Court order until further order of this Court. Notices mailed.

Feb. 15 Memorandum and Order (Aldrich, Ch.J.) remanding the matter to the District Court with various directions and ordering mandate to reissue forthwith. Mandate reissued. Notices mailed.

Feb. 24 Certified copy of proceedings to Supreme Court. Notices mailed.

Mar. 15 Notice of filing petition for certiorari (3/10/71) filed. [No. 1454]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7537

JAMES J. CONNOR,
PETITIONER, APPELLANT,
v.
PHILIP J. PICARD,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE AND COFFIN, *Circuit Judges*.

James J. Twohig for appellant.
Lawrence P. Cohen, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *Garrett H. Byrne*, District Attorney, Suffolk County, were on brief, for appellee.

December 10, 1970

ALDRICH, *Chief Judge*. A Massachusetts grand jury indicted Donald Landry, three other named defendants, and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," in connection with the killing of one Robert Davis. Subsequently petitioner Connor was found in Landry's apartment and arrested. On motion presented to the Superior Court by the district attorney, the following order was entered over petitioner's objection.[1] "Court having determined that the true name of John Doe has been discovered to be James J. Connor, orders the name

[1] We make note of the objection because we are not to be taken as intimating that a Massachusetts defendant cannot waive what we herein hold is his right to be properly indicted.

of James J. Connor to be entered on the record." This procedure was authorized by a Massachusetts statute, Mass. G.L. c. 277, § 19.[2] Petitioner was arraigned on the indictment. After unsuccessful attempts by him to inspect the grand jury minutes to ascertain whether there was evidence implicating him in the killing, the case went to trial and petitioner was convicted of first degree murder. His state appeal challenging, *inter alia,* the validity of the indictment, failed. *Commonwealth* v. *Doherty,* 1967, 353 Mass. 197 (two justices dissenting). He then brought a habeas corpus petition in the district court and, when he failed there as well, this appeal followed.

Petitioner did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that petitioner had not exhausted his state remedy, citing *Needel* v. *Scafati,* 1 Cir., 1969, 412 F.2d 761, *cert. denied* 396 U.S. 861, and *Subilosky* v. *Commonwealth,* 1 Cir., 1969, 412 F.2d 691. We find these cases inapposite. This opinion considers neither facts, as in *Needel,* nor precedent, as in *Subilosky,* that were not available to the Massachusetts court when petitioner was before it. Petitioner presented the court with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *United States ex rel. Kemp* v. *Pate,* 7 Cir., 1966, 359 F.2d 749, 751; *cf. Wilbur* v. *Maine,* 1 Cir.,

[2] "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by another practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment." Mass. G.L. c. 277, § 19.

1970, 421 F.2d 327. That is enough to satisfy the requirements of the exhaustion of the doctrine. *Sullivan* v. *Scafati,* 1 Cir., 1970, 428 F.2d 1023, 1024 n. 1. We therefore turn to the merits.

The Commonwealth's initial brief asserts that ". . . properly viewed, petitioner's sole argument is no more than one that there was insufficient evidence before the grand jury showing that petitioner was Landry's accomplice. Such a claim, however, does not warrant judicial review. [Citations omitted.] There are sound policy reasons underlying the rule that an accused cannot challenge the sufficiency of the evidence before the grand jury." This misstates the issue. Petitioner is not challenging the validity of the grand jury determination. On the contrary, the grand jury itself has said that there was insufficient evidence to indict him, and we accept that as true. *See Commonwealth* v. *Gedzium,* 1927, 259 Mass. 453, 458. The question is whether, since the jury concededly did not find probable cause, petitioner has a constitutional complaint. We assume there is no general due process right to require that prosecution be preceded by an indictment. *Lem Woon* v. *Oregon,* 1913, 229 U.S. 586; *Hurtado* v. *California,* 1884, 110 U.S. 516; *see Beck* v. *Washington,* 1962, 369 U.S. 541, 545; *cf. Ocampo* v. *United States,* 1914, 234 U.S. 91. The issue is whether, in view of the extent to which Massachusetts affords this protection to others, the procedure by which petitioner was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws.

The Massachusetts court has defined the requirements of the Commonwealth's Constitution.

> "The great principle asserted by the Declaration of Rights is that no man shall be put to answer a criminal charge until the ineriminating evidence has been laid before a grand jury, and they have found probable

cause, at least, to believe the facts true on which the criminality depends."

Commonwealth v. *Holley,* 1855, 3 Gray 458, 459 (Shaw, Ch. J.).

Because of this requirement, Massachusetts indictments are, with the possible exception of the John Doe procedure, amendable only with respect "to matters of form and not as to matters of substance." *Commonwealth* v. *Snow,* 1930, 269 Mass. 598, 606.[3] In sustaining the present statute in 1927, the Massachusetts court acknowledged that legislative authority to interfere with the protection of the grand jury system was limited to "minor details or unessential formalities." *Commonwealth* v. *Gedzium,* ante at 459. It justified the procedure by stating, without elucidation, that the addition of the defendant's name was neither an amendment, nor completing an indictment "in blank." Id. at 457, 461.

We are not concerned with the soundness of the conclusion that the John Doe procedure is not in conflict with the Massachusetts Declaration of Rights, but we are concerned with its consequences. There can be no doubt as to the substantiality of the loss to a defendant of the protection afforded by a requirement that there must be an indictment before he can be brought to trial. The grand jury is "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." *Ex parte Bain,*

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[3] *Compare Commonwealth* v. *Cooper*, 1928, 264 Mass. 378 (arson; words "wilfully and maliciously" cannot be added) *and Commonwealth* v. *Snow*, ante (extortion; identity of person threatened cannot be changed), *with Commonwealth* v. *DiStasio*, 1936, 294 Mass. 273 (murder; true name of victim designated as "John Doe" can be attached where indictment alleged date and place of commission of crime). *See also Commonwealth* v. *Crotty*, 1865, 10 Allen 403.

1887, 121 U.S. 1, 11. Nor can we doubt that petitioner was denied that protection. Entering a defendant's name on the record could be termed a matter of form only if the grand jury had already sufficiently described him so that adding the true name was, in fact, only a formal matter.[4] Absent such identification, the court's assertion in *Gedzium* that there was no reason to suppose that the grand jury "did not have in mind a particular person," 259 Mass. at 460, might, with due respect, be termed sophistical. Of course the jury had in mind a particular person, viz., the person who committed the crime. It had nothing in mind, however, to indicate the criminality, to use the court's word in *Holley,* of the petitioner. We must agree with the view of the dissenting justices in petitioner's case. *See* 353 Mass. at 216-18. Petitioner faced trial not as the result of a determination of his criminality by the grand jury, but because, relying on the special statutory procedure, the jury delegated this decision to others.[5]

We come, then, to the question: whether there is adequate justification for the difference in treatment Massachusetts accords defendants like petitioner and those who are brought to trial on regular indictments. If the difference is to withstand constitutional scrutiny it must be based upon classifications which, at a minimum, are rationally

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[4] In *Commonwealth* v. *Crotty*, 1865, 10 Allen 403, the Massachusetts court suggested that if the document—there a warrant—although using a fictitious name, described the defendant's "occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified," it might be "sufficient to indicate clearly" who was intended. Id. at 405.

[5] We may observe that under the Massachusetts John Doe practice not only is it never established that any newly discovered evidence relied upon by the prosecuting attorney in naming a defendant would have been sufficient to persuade the grand jury, there appears to be no obligation on his part to produce any new evidence at all. So far as the statute provides, he is apparently at liberty merely to conclude that the grand jury was over-cautious in rejecting what he originally presented.

related to a permissible state purpose. *See, e.g., Walters* v. *City of St. Louis,* 1954, 347 U.S. 231; *Skinner* v. *Oklahoma ex rel. Williamson,* 1942, 316 U.S. 535; *Lindsley* v. *Natural Carbonic Gas Co.,* 1911, 220 U.S. 61. The Commonwealth has suggested only one justification for its procedure. The court in *Gedzium* said, at 461,

> "[T]he grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge, to disguise his lineaments and peculiarities and to hide his personal appearance and his identifying characteristics so that no adequate description of him can be given when his definite existence as a human being is disclosed and established."

Having in mind that in *Gedzium,* as here, there was no indication that the actor had used any form of disguise, the court's rhetoric is merely a euphemism for the absence of evidence. A more frank, though obviously less palatable, statement of its position would be that while, where the actor is known to the grand jury, he cannot be charged unless it finds the evidence against him sufficient; if he is not known because, like criminals generally, he has neglected to reveal his identity, this relieves the Commonwealth of the necessity of obtaining any grand jury finding of cause.

As the basis for classification, the *Gedzium* rationale is not even minimally persuasive. Even if it should appear that the actor made a deliberate attempt to "hamper" the grand jury, to say that conduct on his part justifies the denial of customary rights to whatever person the prosecuting attorney might thereafter choose as a defendant bridges the very question at issue. One might equally say that a robbery defendant should not be allowed to assert inability to afford counsel in view of all the money he stole.

We see no end served by the statute except prosecutorial convenience. However, the Commonwealth properly does not argue that the mere fact, for no definable reason — whether deliberate, fortuitous, or inadvertent — it sought an indictment before it had sufficient basis for one, should relieve it of the necessity of returning to the grand jury when it had a better case. As a ground for distinguishing between defendants, this is clearly inadequate. *See* Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065, 1081 (1969).

With all deference, the Massachusetts court has approved a procedure similar to the one it condemned in *Commonwealth* v. *Crotty,* n. 4 ante, as comparable to the detested pre-Revolutionary general warrant. It is no better merely because the delegation was made by a grand jury rather than by a magistrate. In the light of the Commonwealth's otherwise universal commitment to grand jury indictments in felony cases, we must conclude that the arbitrary decision to make such a delegation in petitioner's case was constitutionally impermissible discrimination.

The judgment of the district court dismissing the petition is vacated. The case is remanded with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7537.

JAMES J. CONNOR,
PETITIONER, APPELLANT,

v.

PHILIP J. PICARD, Superintendent,
Massachusetts Correctional Institution, Norfolk,
RESPONDENT, APPELLEE.

JUDGMENT

Entered: December 10, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court dismissing the petition for a writ of habeas corpus is vacated and the case is remanded to that court with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth. No costs.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Twohig and Quinn.]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Misc. Civil No. 68-88-G

JAMES J. CONNOR,
PETITIONER,

v.

PHILIP J. PICARD, Superintendent,
Massachusetts Correctional
Institution, Norfolk,
RESPONDENT.

DOCKET ENTRIES

PROCEEDINGS

1968		
Dec.	10	Petition for a Writ of Habeas Corpus filed. Copy mailed to Atty. Gen., Mass.
	20	Order of Notice entered.
	24	Respondent's return filed.
1969		
Mar.	11	Marshal's return of order of notice with service on Dec. 20, 1968, filed.
May	1	Appearance of Edward W. Hanley, II, Asst. Atty. General, for Deft., filed.
June	13	GARRITY, J. ORDER SCHEDULING & LIMITING HEARING, ENTERED. Hearing on June 23rd at 2:30 P.M. Copies to counsel.
	23	Motion for continuance, filed and Assented to. GARRITY, J. On Motion for Continuance, "Allowed — Continued to 7-8-69 at 10 A.M." Copy to both counsel.
July	7	GARRITY, J. ORDER TO PRODUCE. Cert. Copy to Social Law Library; Copies to Messrs. Twohig and McNeil.

1969

8 GARRITY, J. After hearing on Petition for Habeas Corpus, ADVISEMENT. Briefs due in 4 weeks — Aug. 11th; Reply briefs due Aug. 18th. Petitioner's motion for continuance, filed. Pauper affidavit filed by Petitioner. Appearance of Bruce McNeil, Asst. Atty. Gen., filed in Court.

8 GARRITY, J. On petitioner's motion for continuance in part, "After hearing, denied as to paragraph 2; as to paragraphs 6 and 7, allowed to extent that points may be incorporated in brief to be filed by petitioner on or before 8-11-69." Application to proceed in Forma Pauperis, filed and Allowed by the Court.

Aug. 11 Defendant's Brief, filed with c/s.

11 Plaintiff's Memorandum of Law and Fact, filed.

1970

Jan. 19 GARRITY, J. OPINION dated January 16, 1970, FILED. Copies to counsel, and West Publishing.

20 GARRITY, J. ORDER OF DISMISSAL, ENTERED. Copies to all counsel.

Feb. 9 Petitioner's application for Certificate of Probable Cause, filed with c/s.

9 Petitioner's Claim of Appeal, filed with c/s.

10 GARRITY, J. ORDER THAT CERTIFICATE OF PROBABLE CAUSE ISSUE, ENTERED. Copies to Messrs. Twohig and McNeil.

12 Original pleadings delivered to the court of appeals.

Dec. 10 Opinion from the court of appeals entered.

15 Plaintiff's Motion for Bail.

31 Mandate from the court of appeals entered. "The judgment of the district court dismissing the petition for a writ of habeas corpus is vacated and the case is remanded to that court with in-

1970

structions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the commonwealth." No costs. Original pleadings returned from the court of appeals.

1971

Jan. 5 GARRITY, J. ORDER FOR HEARING ENTERED. . .Court will hear the parties on January 11, 1971 at 2:00 o/clock with respect to plaintiff's motion and as to a reasonable deadline for the Commonwealth's Indicting the plaintiff. Copies to Messrs. Twohig, McAuliffe and Attorney General's Office.

11 GARRITY, J. After hearing, court ORDERS that Commonwealth has until Friday, February 12, 1971 to indict the defendant if it so chooses; defendant's Motion for Bail, DENIED.

11 GARRITY, J. ORDER CONDITIONALLY GRANTING HABEAS CORPUS ENTERED. . .after hearing pursuant to mandate of the Court of Appeals dated December 31, 1970, it is ordered that the writ of habeas corpus sought by the plaintiff herein issued unless the plaintiff is indicted by the Commonwealth on or before February 12, 1971. cc/cl.

Feb. 11 Motion for Stay or Bail filed by Respondent with c/s.

11 GARRITY, J. re Motion for Stay or Bail — "DENIED, for the reason that the action sought by the movant is beyond the court's authority under the mandate of the Court of Appeals dated 12/31/70". cc/cl.

16 Certified copy of Order Of Court entered Feb. 12, 1971 received from the Court Of Appeals entered. It is ordered that the mandate of this Court of December 31, 1970, be, and the same

1971

hereby is, recalled and It is further ordered that the order of the District Court of January 11, 1971, be, and and same hereby is, stayed until further order of this Court.

16 Memorandum and Order Entered February 15, 1971 received from the Court of Appeals. The courtupon receipt of the Commonwealth's Motion to recall mandate and impose bail issued a temporary "hold" order of February 12 because of the shortness of time. It now addressed itself to the substance of the motion. It might seem that the Commonwealth could have determined in less than two months whether it wanted to petition for certiorari. On the other hand, we do not agree with the district court, if that was its ruling that it did not have power to extend the February 12 indictment cutoff within our order specifying a reasonable time. The commonwealth's decision to seek certiorari has a direct bearing on this subject.

The matter is remanded to the district court with the following instructions:

1. The February 12 date set in its order of January 11 is extended to Feb. 24.
2. If the district court believes in the interest of justice, that this date should be further extended, it has power to do so.
3. If the district court is of the opinion that the defendant should be released on bail pending the filing of a petition for certiorari, or afterwards, it has power to do so, subject to review by this court.

Feb. 16 It is further ordered that mandate reissue forthwith.

1971

18 GARRITY, J. Hearing held and further hearing scheduled for Thurs. Feb. 25, 1971 at 4:00 P.M.

19 GARRITY, J. ORDER EXTENDING TIME WITHIN WHICH PETITIONER MAY BE INDICTED ENTERED. it is ordered that the time within which the Commonwealth may seek an indictment of petitioner from a grand jury is hereby extended until the date (Probably March 10, 1971) by which the Commonwealth must file a petition for certiorari in the Supreme Court of the United States.... Further hearing on the question of bail is hereby scheduled for 2/25/71 at 4:00 P.M. cc/cl.

19 Motion for Writ of Habeas Corpus Ad Testificandum FILED with c.s,

22 GARRITY, J. re Motion for Writ of Habeas Corpus — ALLOWED". CC/CL.

22 Writ of Habeas Corpus issued to U. S. Marshal returnable 2/25/71.

25 GARRITY, J. hearing re Bail — after hearing, petitioner's motion for allowance of bail — DENIED.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

Civil Action 68-88-G

JAMES J. CONNOR,
PETITIONER
v.
PHILIP J. PICARD,
Superintendent Massachusetts
Correctional Institute

PETITION FOR WRIT OF HABEAS CORPUS

December 18, 1968

Your petitioner, James J. Connor, now presently confined in Massachusetts Correctional Institution, Norfolk, in the custody of Philip J. Picard, Superintendent of said institution, in the Town of Norfolk, in the Commonwealth of Massachusetts, respectfully represents that:

(1) Your petitioner, a citizen of the United States, having been born in Boston, in the said Commonwealth, and resided there throughout his life, is now unjustly and unlawfully restrained of his liberty and detained under the authority of the said Commonwealth in said institution.

(2) Your petitioner is thus held and deprived of his liberty by virtue of a conviction of the Superior Court of Suffolk County of the said Commonwealth on the twenty-sixth day of March A.D. 1966, and a commitment issued thereunder. A copy of this instrument marked Exhibit "A," being page 2 of the record of the trial court containing the docket entries, is hereby incorporated by reference.

(3) Your petitioner has exhausted his remedies in the courts of the said Commonwealth, having duly appealed to the Supreme Judicial Court of the said Commonwealth where the judgment against your petitioner was affirmed.

A copy of the decision of the Supreme Judicial Court, which was handed down on August 22nd, 1967, accompanies this petition, being marked "Exhibit B," including the dissenting opinion of Justice Kirk and Justice Spiegel.

FACTS OF THE CASE

On August 4th, 1965, the Grand Jurors in the County of Suffolk in the Commonwealth of Massachusetts, considering the violent death of one Robert W. Davis, who on May 1st, 1965, had been despatched by a shotgun, returned an indictment on their oath affirming that Davis had been murdered by "Donald E. Landry, otherwise known as Emo Landry, and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." At this hearing before the Grand Jury, testimony was given by a young woman called Betty Moore and a man known as Ronald Hayes, afterwards, at the trial of the case, the only witnesses to identify your petitioner as a principal.

At another session of the same Grand Jury two months previous, in June, 1965, Betty Moore had also testified. On that occasion also, no indictment issued against your petitioner.

A copy of the aforesaid indictment of the defendant Landry marked "Exhibit C" is hereto attached and incorporated by reference.

On August 4th, the date of his indictment, Donald Landry had already been for some time incarcerated in a penal institution on another charge. On August 6th, two police officers went to the apartment of Landry and his wife in Boston. They were permitted to enter and engaged in conversation the persons present, Landry's wife and four of her friends, two men and two women. One of the men was your petitioner, James J. Connor. Both men were finally taken to Boston Police Headquarters where they were held for several hours, and where it was ascertained

by the police that the other man, one William Hoar, had been in prison on May 1st, the date of the homicide. Your petitioner was then taken to Police Division 11 in Dorchester, Boston, and served with a "John Doe" warrant containing the words of the indictment of August 4th and bearing the same date. He was then booked and returned to Headquarters, where he was again questioned. About five hours after his arrest, the petitioner was allowed to telephone for a lawyer. (A copy of the said warrant is hereto attached and incorporated by reference marked "Exhibit D.").

Three days later, on Monday, August 9th, 1962, your petitioner was "indicted" on motion (a copy of which is hereto attached marked "Exhibit E") of the Suffolk County prosecutor by the substitution in the outstanding blank indictment of the words, "James J. Connor," for the words, "John Doe." This was done over the objection and exception of his counsel after brief argument. The amendment was supported only by the prosecutor's statement in two sentences, "At the time the indictment was returned, the District Attorney and the grand jury did not know the name of the defendant. Since the indictment has been returned, we have ascertained the name of the defendant."

No evidence was offered, and no other statements of fact were made tending to prove these assertions.

In March 1966, Betty Moore, at the trial of the case, testified against Connor and stated that she knew him for a considerable time before May 1st, 1965. Ronald Hayes identified Connor as one of the principals in the crime. He also said that he had never met Connor before the crime and never saw him afterward until August 6th at Headquarters, the day of Connor's arrest, and two days after Hayes's appearance before the Grand Jury. As stated above, they were the only two identifying witnesses.

Since Connor was a short, slender, young man, easily described and identifiable from information at Boston Police Headquarters, the inference is inescapable that neither witness connected Connor with the crime before the Grand Jury in any way, and that their lack of testimony was responsible for the blank description and name on the indictment as to the second man charged. But two days later, after Connor had been fortuitously arrested in Landry's apartment (neither Hayes nor Moore was among those present) and taken to Headquarters, where Hayes saw him, Connor's name was put into official connection with the case for the first time by the booking at Division 11.

Betty Moore, pressed on these matters at the trial, declared that she gave a different story to the Grand Jury in August, 1965, from the story she was then giving to the trial jury, and that she had given still another story to the Grand Jury in her testimony in June, 1965.

From August 5th, the day before your petitioner's arrest, the matter was never again referred to the Grand Jury for the consideration of evidence or a change in the sworn statement by the Grand Jury that it did not know and had no description of the second man to be charged with the murder of Robert W. Davis.

At the trial, Hayes testified that he left the scene shortly after the crime with a Luger in his possession, which was one of two carried by the victim Davis that night. He disposed of the Luger by dropping it in a sewer a short distance from the house where Davis was killed, but it was later recovered and put in evidence. No charge was ever brought against Hayes. He testified that he had never spoken with the police before the day in August, 1965, when he was picked up by them and taken to the Grand Jury.

Although Miss Moore had repeatedly testified that she

did not know the victim Davis, there was testimony by her employer at a voir dire, excluded from the trial jury, that he had been robbed by an armed man during her lunch hour on Wednesday, April 28th, three days before the murder, and he was asked to go to Police Division 4 to look at some photographs. On her return from lunch, her employer testified, Miss Moore said that she had noticed some people outside the cashier's cage that morning, and she wanted to go with him to look at the pictures. Her employer picked out a picture of Davis and discussed his resemblance to the robber who had held him up with Betty Moore. The majority opinion of the Supreme Judicial Court of Massachusetts declared that this evidence was admissible, but that the error in excluding it was not reversible. No charge was brought against Miss Moore of any kind based on the events of April 28th or May 1st.

Before he was killed in the early morning of May 1st, 1965, Robert W. Davis, who had two Luger pistols in his possession, threatened to kill William and Janice Doherty (convicted accessories to his murder in this case) and their baby son, in his crib, and at one point held his pistols to the heads of William and the baby at the same time.

On August 13, 1965, the defendant Connor's plea of not guilty was entered.

On August 24, 1965, the defendant Connor's motion to inspect Grand Jury minutes was filed and denied without prejudice. On March 10, 1966, this motion was renewed by leave of Court and was denied.

On September 10, 1965, the defendant Connor filed a motion to quash the indictment and a motion to dismiss the indictment. On September 24, 1965, both of these motions were denied.

On January 17, 1966, the defendant Connor filed a motion for severance. On February 9, 1966, this motion was denied

by the Court. On March 10, 1966, this motion was renewed by leave of Court and was again denied.

A motion for particulars was made on September 8th, 1965, and that part of the motion requesting information relating to the identification of Connor or relevant testimony before the Grand Jury was denied on September 24th. Your petitioner excepted.

This case, together with indictments charging William R. Doherty and Janice M. Doherty with being accessories before and after the fact of the said murder, was tried before Tomasello, J. and a jury in the Superior Court for Suffolk County, beginning on March 14, 1966, and ending on March 26, 1966.

On March 26, 1966, a verdict of guilty was rendered as to each defendant, with the recommendation that a sentence of death be not imposed. On the same day, the defendant Connor was sentenced to imprisonment for life.

The defendant Connor's claim of appeal was filed on March 29, 1966.

The Supreme Judicial Court of the Commonwealth, on August 22nd, 1967, affirmed the convictions, with two justices dissenting. As to Connor, the dissenting justices, in an opinion written by Justice Kirk, said, "In the case against Connor, the judgment should be reversed, the verdict set aside, and the indictment quashed."

ARGUMENT

It is submitted that the petitioner Connor was deprived of his liberty and is now unlawfully held without due process of law for these reasons:

(1) He was brought to trial without indictment or presentment in violation of the Fifth Amendment and of the Massachusetts Constitution, Part I, Article XII, the statutory provisions of Section 19 of Chapter 277 of the General Laws of the Commonwealth of Massachusetts, and of the rule of the common law that an indictment in a capital

case, which, it is contended by your petitioner has never been changed by legislative enactment, forbids any amendment to such an indictment.

It has been the contention of the defendant Connor in this case that his case was never brought to the attention of the Grand Jury, that the matter of the probable cause of his guilt was never considered by them, and that he was never indicted. The indictment itself, presented under oath by the Grand Jurors, bears this out. In it the Jurors swear that the identity of the second man involved as a principal in the alleged murder of Robert W. Davis was unknown to them and that they had no description of him. By the use of the words "John Doe" they could only indicate that they had received information that a second man was involved. "John Doe" is not an alias or a fictitious name in the sense that it was so used by any person. It is not an erroneous name, nor a nickname. It is a legal device for filling a blank, a device which is perhaps justified when accompanied by "any other practicable description," but by itself it does nothing more than fill out the terms of a general or blank indictment or warrant, a modern lettre de cachet, the type of document described by Chief Justice Bigelow in Commonwealth v. Crotty, (10 Allen 403, 404), "upon which any other individual might have been arrested, as being included in the description, as the defendant himself."

The defendant Connor therefore contends that the indictment was a nullity, that the record shows that an amendment was offered by motion and allowed, that this amendment was improper in a capital case, improper and invalid as it was prejudicial to Connor, and ineffective in its attempt to cure a nullity, and that, therefore, the motion should have been denied and the case against Connor, if any, referred to a Grand Jury in accordance with his inalienable right.

(2) Your petitioner was arrested without probable cause and without a warrant on August 6th, 1965. A few hours after his arrest, a warrant based upon the indictment and with identical wording as to lack of description was served upon him while he was still in custody. It is the contention of your petitioner that the warrant was a nullity and that the original arrest could not be validated thereby nor by still another attempt to resuscitate it at the Charles Street Jail on August 11th, 1965, two days after the first appearance of your petitioner's name on the trial court's docket, by the service of still another document upon him in which he was identified by name. A copy of this instrument is hereto attached marked "Exhibit F."

Your petitioner was therefore unlawfully seized and arrested, in violation of the Fourth Amendment of the Constitution, and in violation of Articles XII and XIV of the Massachusetts Constitution, and of this rights under the statutory and common law, and therefore of the Fourteenth Amendment.

(3) Your petitioner was denied a full and fair trial of his case when, on various pretexts, he was repeatedly refused access to testimony which had been given before two sessions of the Grand Jury which had failed to indict him. Both of the witnesses, without whose testimony your petitioner could not have been convicted, had appeared before said body, one of them on two occasions. This latter witness admitted to having told different stories on both occasions. Your petitioner made repeated attempts to obtain information on this testimony, which was essential to the preparation of his defense, by motions, by demands for particulars, by requests during the hearing of pre-trial motions on other matters, and by requests during the trial, especially on the occasion when this witness flatly admitted intentionally telling three different stories under oath.

In the same way, your petitioner was denied a full and

fair trial when his counsel was denied an opportunity to question or confer with material witnesses in the same manner as the prosecution, to which they were constantly available.

(4) The petitioner Connor contends that he has been deprived of a fair rtial by being tried with the co-defendants, William Doherty and Janice Doherty, by reason of the following circumstances.

In the cases against William and Janice Doherty, the District Attorney, pursuant to an order of Court, filed certain "answers to written bill of particulars." These documents set forth a lurid and highly prejudicial tale of the way in which the murder allegedly occurred. They contain much material which could not have been admitted against your petitioner in evidence at trial, and in fact the story therein recounted differs materially from the evidence received under oath at trial. These papers, being in the nature of specifications or particulars, were given to the jury when they retired to deliberate upon their verdicts as to the several defendants. It would hardly be idle speculation to suggest that the jurors, after hearing lengthy oral evidence and having only this version of the facts before them, were influenced by the prejudicial matter therein, and did not consider its inapplicability to the other defendants.

(5) Your petitioner was denied a full and fair trial when the trial court ruled that numerous jurymen were disqualified because they expressed various degrees of repugnance toward the death penalty and varying mental reservations as to its propriety and their will and capacity to impose it, although it was not shown that they could not return a verdict of guilty in some cases, provided they were allowed to recommend that the sentence of death be not imposed; and furthermore, your petitioner's counsel was not accorded the right to examine the veniremen in any reasonable degree.

(6) Your petitioner was denied a full and fair trial when the presiding judge excluded evidence tending to prove the complicity in crime of the aforesaid Betty Moore, the key witness, with the victim, Robert W. Davis, on and before the occasion of his demise, and bearing on the truth of the testimony on identification of your petitioner by the said Betty Moore, an admitted perjurer.

(7) Conversations between the co-defendants Janice Doherty and William Doherty with certain police officers, which were constitutionally inadmissible against them, as they had not previously been advised of their rights, and certain conversations which were alleged to have taken place between them and between other people and them, all in the absence of your petitioner and grievously prejudicial to him, were admitted in evidence by the trial court, over the objection of your petitioner's counsel and after denial of his motion for severance, seasonably made and intended to forestall this double injustice.

The fact that the trial court gave limiting instructions to the jury as to the use of most of this testimony does not alter the fact that Connor was thereby prejudiced. It is clear unrealistic to expect a jury to segregate all of the voluminous evidence perceived in a trial of this length into separate categories of admissibility as to each individual defendant.

WHEREFORE, your petitioner, James J. Connor, prays that:

(A) A writ of habeas corpus issue, directed to the said respondent, Philip J. Picard, Superintendent of Massachusetts Correctional Institution, Norfolk, and commanding him to have the body of your petitioner forthwith before this Honorable Court.

(B) The aforesaid sentence and judgment of your petitioner is vacated.

(C) Your petitioner be delivered from unlawful custody and restraint.

(D) This Court grant and impose such other order, terms, and conditions as it may deem meet and proper.

JAMES J. CONNOR
By his attorney,
JAMES J. TWOHIG

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED IN PRINTING]

RESPONDENT'S RETURN

The respondent makes the following return and for answer to each and every paragraph of the petition for habeas corpus says that:

1. The petitioner is properly in respondent's custody and is under restraint at the Massachusetts Correctional Institution, Norfolk in the Commonwealth of Massachusetts.

2. The petitioner is in the respondent's custody and is under restraint at said institution by virtue of a warrant of commitment, a copy of which is annexed hereto and marked "A".

3. Respondent admits the allegations of paragraph (1), (2) and (3) of the petition in so far as they are allegations of face and not conclusions of law.

PHILIP J. PICARD
Massachusetts Correctional
Institution, Norfolk
Respondent
By his attorney
DAVID C. HAWKINS
Assistant Attorney General

COPY

30 Mar. *Lifer #1*
No. 19494 N 18234
MASSACHUSETTS CORRECTIONAL
INSTITUTION, WALPOLE.
WARRANT VS.
JAMES J. CONNOR
(Illegible)

LIFE

March 26, 1966
To Norf.—9-25-67

MASS. CORRECTIONAL INSTITUTION
WALPOLE
RECEIVED AND COMMITTED
Mar 26 1966
(s) PALMER C. SCAFATI, *Superintendent*

3-26-66 *Life 1st Degree—*
No death pen. imposed

(Illegible) *Death*
(Illegible) *None*

A
Commonwealth of Massachusetts.

SUFFOLK, TO WIT:

To the Sheriff of said County of Suffolk, his Deputies, the Officers of the Court hereinafter named, and the Superintendent of the Massachusetts Correctional Institution, Walpole, in the County of Norfolk.

L.S. GREETING:

Whereas, by the consideration of the Superior Court holden at Boston within and for the County of Suffolk for the transaction of Criminal Business, on the twenty-sixth day of March in the year of our Lord one thousand nine hundred and sixty-six,

JAMES J. CONNOR

now in custody of the Sheriff of said County of Suffolk, convicted of the crime of

Murder in the first degree but the jury recommends that the sentence of death be not imposed,

committed at said Boston, was sentenced to be confined in said Massachusetts Correctional Institution, Walpole, for and during the term of his natural life, and to stand committed in pursuance of said sentence.

WE, THEREFORE, command you, the said Sheriff, Deputies and Officers of said Court, to remove the said James J. Connor from the Jail in Boston in the said County of Suffolk, to said Massachusetts Correctional Institution, Walpole in the said County of Norfolk; and we command you, the said Superintendent to receive the said James J. Connor and immediately thereon to cause the said James J. Connor to be confined therein for and during the term of his natural life.

And for so doing this shall be your warrant; and you said Sheriffs and Officers are to make return of this warrant with your doings thereon to the office of the Clerk of said Superior Court in Boston as soon as may be.

Witness, G. JOSEPH TAURO, ESQUIRE, Chief Justice of said Superior Court, at Boston, this twenty-sixth day of March in the year of our Lord one thousand nine hundred and sixty-six, and sealed with the seal of said Court.

(s) ROBERT P. CONNOLLY

A True Copy,
Attest:

FRANCIS M. MASURET, JR.
Assistant Clerk of
said Superior Court.

A

SUFFOLK, TO WIT: CITY OF BOSTON March 26, 1966

In obedience to the within warrant, I have conveyed the within-named defendant to the Massachusetts Correctional Institution, Walpole, in the County of Norfolk, and delivered him to the Superintendent thereof with a copy of this warrant.

(s) ROBERT P. CONNOLLY
Officer of the Court within named.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Misc. Civil No. 68-88-G

JAMES J. CONNOR,
PETITIONER,

v.

PHILIP J. PICARD, Superintendent, Massachusetts Correctional Institution, Norfolk,
RESPONDENT.

MEMORANDUM OF LAW AND FACT

This memorandum relates to certain reasons, five of the original seven, contained in that part of the Petition of the

Plaintiff entitled "Argument," and being, specifically, the reasons numbered (1), (3), (4), (6), and (7).

(1)

The function of the Grand Jury at common law was the determination of probable cause. *Beavers* v. *Henkel,* 194 U.S. 73, 84.(1904). It provided a barrier for the individual against unjust prosecution by representatives of the sovereign, against charges unfounded on credible testimony or based upon personal malice, zealous ambition, or other unworthy motives. It still provides that barrier where it is permitted to function as it did in this Commonwealth in the time of Chief Justice Shaw and Chief Justice Bigelow and it still has the same purpose. *Costello* v. *U.S.,* 350 U.S. 359, 362. *Hale* v. *Henkel,* 201 U.S. 43, 59.

That purpose is unquestionably a fundamental principle of liberty and justice basic to our system of law. It is recognized even in Hurtado in one of the concluding paragraphs, "Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law." *Hurtado* v. *California,* 110 U.S. 516. (1884).

So that it has been recognized without exception that it is the right of individual citizens to be protected against public accusations of infamous crimes, and from the prosecution of public trials, conceived in haste or malice or arbitrary arrogance. *Jones* v. *Robbins,* 8 Gray 329. *Ex parte Bain,* 121 U.S. 1.

Where the right is protected by the Grand Jury and the process of indictment, the fundamental principles of due process must be observed in its administration. As it was

said by Chief Justice Shaw in *Com.* v. *Drew,* 3 Cushing 279, "Where it is found that there is some mistake in an indictment, as a wrong name or addition, or the like, and the Grand Jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the Grand Jury to return a new indictment, avoiding the defects in the first." (Quoted in Bain.)

In the petitioner's case, the matter had been brought to the attention of the Grand Jury at least twice, in June and August, 1965, and the indictment had been handed up to the Court on Wednesday, August 4th, yet the Court allowed the amendment on motion of the prosecutor only a few days later, on August 9th, without considering its resubmission to the Grand Jury. Counsel for the petitioner Connor objected to the amendment that there was no information on which Connor's name could be substituted, that "John Doe" had been indicted, and no additional evidence which justified Connor being named had been produced.

Implicit in these objections were the contentions that Connor had not been indicted, that Connor was illegally arrested, and that no evidence had so far been adduced justifying Connor being accused, much less indicted.

The Court replied that there was "a perfect defense to the offense, then." The Assistant District Attorney was not asked whether there was in fact reason to hold Connor other than that he had been arrested, whether there had been evidence describing Connor in any way to the Grand Jury, or the circumstances of Connor's arrest. All these were preliminary considerations and not matters to be properly considered at a trial on the merits, although the Court so suggested.

In Massachusetts the method of determining probable cause is the process of indictment by the Grand Jury derived from the common law of England.

Amendment of an indictment under Massachusetts law as to a matter of substance is not permissible. *Com.* v. *Snow,* 269 Mass. 598. (1930).

But an indictment in a capital case cannot be amended in any respect, even with the consent of the defendant. *Com.* v. *Mahar,* 33 Mass. 120.

In the case of *Maxwell* v. *Dow,* 176 U.S. 581, the Supreme Court, speaking of the right of trial by jury and the right to indictment by a Grand Jury, said, "These (rights) are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both."

But this dictum has now been rejected by the Supreme Court in *Duncan* v. *Louisiana,* 20 L Ed 2d 491, 497, 499, in the instance of one of these twin rights, that of trial by jury, the Court in its decision approvingly quoting Blackstone in coupling both of them, "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogatives of the crown."

Since in Massachusetts, the method of preserving the fundamental right protected by the process of indictment has been retained as it was received from the Framers of our Constitution, it must be administered in accordance with the principles pertaining to the Grand Jury as established by the law of the land, i.e., in accordance with due process as created by the common law and adopted by our Constitution. *Ex parte Bain,* 121 U.S. 1, and the cases there cited, especially those of Massachusetts.

In accordance with these principles, since the indictment did not name nor describe the petitioner, it was, as to him, a nullity, and remained so after amendment.

The provisions of G.L. c. 277, s. 19, if constitutional at all after Bain, like the provisions of s. 35A in the same chapter, being in derogation of the common law, must be

strictly construed. But even if they are not so construed, it is impossible to believe that the Legislature intended to authorize the issuance of blank indictments by the use of a subterfuge. The words "John Doe" without more do not indicate a specific person any more than the use of the word "murderer," if used to fill the blank.

(3) (First Paragraph)

Prior to the trial by jury of James J. Connor in the Superior Court of Massachusetts at Boston which commenced on Monday, March 14th, 1966, there were certain pre-trial hearings in the same court which began three days after August 6th, 1965, the date of the defendant's arrest, and continued until March 14th, as follows: August 9th, 1965 (before Chief Justice Tauro); August 13th, 1965 (before Chief Justice Tauro); August 24th, 1965 (before Chief Justice Tauro); September 15th, 1965 (before Justice Paquet); November 4th, 1965 (before Justice Murray); January 17th, 1966 (before Chief Justice Tauro); March 10th, 1966 (before Justice Tomasello), and March 14th, 1966 (before Justice Tomasello). Justice Tomasello conducted the trial.

In addition to the foregoing hearings on motions, there was a hearing on probable cause in the Municipal Court of Dorchester shortly after May 1st, 1965, the date of the homicide, as a result of which William R. Doherty was held on a charge of murder. Doherty was afterwards on August 4th, 1965, indicted as an accessory to the same homicide.

At the hearing if August 13th, 1965, the matter of the grand jury minutes was first discussed, and it was clearly established that the defendant Connor had a particularized need for the minutes not only for the purposes of preparation for trial and for cross examination but also to prove conclusively the defendant Connor was not identified nor considered nor indicted by the Grand Jury. The minutes

were indispensable to the presentation of testimony by Connor at a preliminary evidentiary hearing on dismissal.

This need was developed in an argument on bail which revolved about the facts of the case to that point insofar as they led to certain inescapable conclusions about the grand jury testimony.

The prosecutor referred to the facts of the case which required that Connor be held without bail. Connor's counsel pointed out that no facts had been revealed in this case. He declared that the facts as to identification or lack of identification of the person charged before the Grand Jury had not been disclosed and that there was no description in the possession of the officer making the arrest. He asserted that the same witnesses had appeared before the Grand Jury between May 1st and August 4th, the latter date being that of the blank indictment, and that Connor was not connected with the crime until after his arrest on August 6th. He related in detail the circumstances of the arrest, which he implied was illegal, being without probable cause. He stated among other things that Connor did not attempt to flee from the place of arrest, although he had an opportunity. This was the only fact that the prosecutor denied and he then gave that fact as the ground of his recommendation of no bail. (The denial was not positive, "I wasn't there, but I understand he attempted to flee. Based on these facts (sic), the Commonwealth highly recommends there be no bail.") Connor's counsel then again requested some information from the prosecution justifying anything, bail, arrest, or indictment. The Court then stated justification as follows, "I think the obvious fact is that the grand jury has indicted him for first degree murder." This variant of the colloquial saying, "He must be guilty, or they wouldn't have arrested him," was immediately denied by Connor's counsel, to whom the Court replied in effect that the question of indictment was a mat-

ter for trial, not on a matter for bail. The Court, however, then inquired of the prosecutor for the Grand Jury minutes. The prosecutor replied that they were being typed up, that they hadn't been typed. These minutes related to hearings which had taken place in part at least two months before and had concluded nine days before. The Court then asked the prosecutor as an officer of the Court if he would state that Connor's counsel was in error. Whereupon the prosecutor admitted that counsel for the defendant was right in certain things but did not specify which. As he had previously denied specifically only the statement that Connor did not flee arrest and that very uncertainly, it is obvious that he was aware that the statements of Connor's attorney as to the evidence before the Grand Jury were correct.

The Court then promised to look at the Grand Jury minutes, if that motion was presented.

At the hearing of August 24th the motion for the minutes was presented. The prosecutor commenced with unsupported statements regarding a campaign of "unabashed terror" by the defendants, all of whom were in custody, against the witnesses. The Court asked for some basis. No basis was given except further wild assertions about additional murders and complete terror. The colloquy between the Court and Connor's counsel indicated that the Court had not inspected the Grand Jury's minutes as yet. The motion was denied without prejudice. The Court suggested particulars and specifications and that it could not disregard the statements of the prosecutor made in open court. In this discussion the invalidity of the arrest was brought out, and the circumstances surrounding the arrest and the indictment were again shown to prove the particularized need for the minutes of the Grand Jury. The Court persisted in treating the discussion as an attempt to establish guilt or innocence, while the defendant's coun-

sel repetitiously asserted the irresistible tendency of the known facts to show lack of probable cause for the indictment and the need for the minutes to establish this conclusion beyond the shadow of a doubt.

On September 15th Connor's counsel argued on a motion for particulars (pages 10 to 16) the particularized need of the defendant for certain Grand Jury information to be obtained through the particulars in order to guarantee the defendant his constitutional rights. On all such particulars the motion was denied.

On January 17th Connor's counsel repeatedly requested, in a hearing on a motion to inspect and copy documents, a statement declared by the prosecutor to have been made by a witness as to certain utterances alleged to have been made by Connor at the time of the homicide. Connor's counsel demanded that such a copy of the alleged statement should be given to the defense, implying that the statement had never been uttered before the Grand Jury. (Pp. 3, 4, 5).

At the hearing of February 9th the necessity of the defense for the minutes was argued again by Connor's counsel. (Pp. 20-23). A federal case was cited. *Allis-Chalmers* v. *The City,* 323 Fed. 2d, 233.

At the hearing of March 10th, the motion for inspection of the minutes was renewed, and an exception was taken to its denial. (P. 18).

At the trial on page 903 the Court, in saying that the defense could not question the witness Betty Moore as to inconsistent statements made before the Grand Jury unless it first introduced positive evidence of such inconsistent statements, blandly ignored the fact that the Court's action in denying the defense access to the minutes precluded the proof which it demanded, and then called the attempt so to question the witness a "fishing expedition for the purpose of getting the grand jury minutes in evi-

dence here and only for that purpose." By this time it seemed that the primary objective of the Court and prosecution had become the prevention of the public revelation of the testimony contained in the minutes. When counsel for a co-defendant suggested that the Court look at the minutes and then decide whether the questions could be put, the Court immediately foreclosed this by allowing such questioning at once. (P. 905). After admissions of inconsistent statements, the defense moved for the minutes (P. 908). The Court suggested getting the stenographer and refused to give the minutes to counsel. The Court then suggested that the prosecutor give the defense the name of the stenographer. (P. 909). The prosecutor evaded this, implying that he didn't know the name, but he promised to find out. Of course this was never done. The Court then instructed the prosecutor to produce the stenographer (after he should find out who the stenographer was) and also the minutes "only in relation to the matter at issue as to this witness." The prosecutor said he would try. He had but "one set" of minutes. Of course, neither any part of the minutes nor the stenographer were ever produced.

The prosecutor later, on another demand, said he would not produce the minutes, but he offered to put the stenographer on the stand to recite the testimony of the witness Moore. (P. 914).

During the direct examination by the prosecutor of the witness Betty Moore it became material to determine the date when she went before the first Grand Jury in 1965. The prosecutor refused to admit that he knew the date, and declined to place it more accurately than "either June or July." (P. 873).

Counsel for Connor moved to suppress the testimony of the witness Betty Moore while she was being cross-examined by other counsel. (Pp. 901, 902) and after she had testified on direct examination that she "went

through'' a false story of the homicide with another person which she was to give in Dorchester Court, where she testified later. (Pp. 867-868).

The Court ruled during cross-examination of the witness Betty Moore that the prosecution was not entitled to examine a transcript of the proceedings in the Dorchester Court which was in the possession of counsel for co-defendant William Doherty, saying to the prosecutor, ''Well, you wouldn't let them look at the Grand Jury minutes. I suppose they have the same rights.''

(3) (Second Paragraph)

''Under art. 12 of the Massachusetts Declaration of Rights, a defendant shall have a right to produce all proofs, that may be favorable to him. If the Commonwealth could prevent access to material witnesses by holding them in its custody, this constitutional guaranty would be seriously impaired. To say that a defendant has a right to present his defense and then to deprive him of the means of effectively exercising that right would reduce the guaranty to an idle gesture.'' . . . . . The denial of the defendants' motions was prejudicial error and this error tainted the murder convictions and the convictions for breaking and entering. If there had been a showing of special circumstances, it would have been appropriate for the court to impose reasonable conditions and restrictions on the interviews. But there was no such showing here and the denial of the motions was unconditional. *Comm.* v. *Balliro,* 349 Mass. 473; *Melanson* v. *O'Brien,* 191 F.2d 963.

On September 8, 1965, your petitioner filed a motion for the names of the witnesses who had testified before the Grand Jury, as these names had not been endorsed upon the indictment. The Court purported to grant this motion on September 14th but ordered the list ''impounded'' in the Clerk's office. This was done on October 21st. On November 23rd Connor filed a motion for the addresses of the

witnesses, and for an opportunity to interview witnesses in custody. This was denied on February 9th. On January 17th the counsel for Connor complained to the Court that he had been given no list of witnesses. The Court said, "They can't keep the witnesses from you."

Up to the time of trial counsel for the defendant Connor never was granted an opportunity to interview any witness in custody or sufficient information to enable him to interview any of the several disinterested witnesses.

This course of conduct on the part of the prosecution and the Court constituted an interference with his fundamental constitutional right to a fair trial under both state and federal law.

(4)

The right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him secured by the Sixth Amendment. *Pointer* v. *Texas,* 380 U.S. 400 (1965). *Bruton* v. *United States,* 20L Ed 2d 476 (1968).

Attorneys for two co-defendants filed motions for particulars and in response on December 13th, 1965, the prosecution filed certain improper and incompetent specifications. (See pages 9ff., Papers No. 5 and No. 6, Case No. 18314, and pages 29ff., Papers No. 4 and 5, Case No. 19465, of the Summary of Record, hereinafter referred to as R.) In these particulars certain statements purporting to be factual were made as to all four defendants. They were so far from coinciding with the evidence at the trial that, in the case of William Doherty, although their purpose was to establish his guilt as an accessory before the fact, the Supreme Judicial Court was constrained to reverse the conviction of Doherty and direct the entry of judgment for him on that charge.

Aside from the fact that the prosecutor ignored and defiantly failed in these papers, or at any time prior to trial,

to furnish certain details requested, e.g., "the means by which the crime was committed," made statements of fact that he never attempted to prove, and was still concealing on December 13th the names of two material Grand Jury witnesses, Betty Moore and Ronald Hayes, referred to as "a third person" and as "other persons who were present," these particulars, which were part of the record and went to the jury with the indictment to be considered and read by them in their deliberations, contained also a most inflammatory description of the homicide, which could not fail to be prejudicial to Connor, since he was positively named as one of the killers in both sets of answers. These particulars were read to the jury by the Assistant Clerk of Court, attending the trial, as parts of the indictments, on the second day, and the reading occupies twenty-three pages of the record, as follows: as to your petitioner and the co-defendant Landry, three and a half pages, Transcript (hereinafter designated as Tr.) pp. 56-59; as to the co-defendant Janice Doherty, charged as an accessory, in whose case the particulars were most incendiary and prejudicial, eleven and a half pages, Tr. 60-72; and as to the co-defendant William Doherty, seven and a half pages, Tr. 72-79.

In view of the Court's statement to the jury, at the opening of the session on the third day, Tr. 88, 89, that the effect of the particulars when filed is "to bind and restrict the Commonwealth as to the scope of the indictment and the proof offered under it," the failure to take some action, and especially in regard to the particulars as to William Doherty, is incomprehensible except as part of the pattern revealed from the beginning by the refusal to send the case back to the Grand Jury to consider the indictment of the accused James Connor (doubtless because the Court and prosecutor were well aware that the Grand Jury could not be depended upon to be sufficiently

gullible to swallow still another version of the alleged homicide from Betty Moore, for the same Grand Jury was in session in August that had heard the matter from May or June), by the determination of the prosecutor to withhold all evidence favorable to the petitioner, by the many refusals of the prosecutor to reveal the names of the Grand Jury witnesses, in violation of the established law of the land, by the failure of the prosecutor to produce or the Court to order the production of proof of valid arrest when such was denied by your petitioner at many of the preliminary hearings on repeated statements of facts never contradicted by the prosecutor, by the persistent and successful struggle waged by the Court and prosecutor to deny the defendants the opportunity to interview certain material witnesses under appropriate conditions, the exclusion of certain testimony tending to impeach the witness Betty Moore and to demonstrate her involvement in at least two criminal conspiracies connected with the homicide although the evidence was later acknowledged by the Supreme Judicial Court to have been admissible, and by the devious maneuvers and tawdry fabrications employed and tolerated to ensure the shrouding of the Grand Jury minutes from the clear eye of inquiry according to due process.

The statements in the particulars were not presented as evidence, but they reached the jury nevertheless in a positive and uncontradicted form. Neither cross-examination nor any other form of testimony was available to contradict them. There were limiting instructions which were not particularly forceful or in any way detailed, Tr. 88-89, which doubtless had even much less than the usual effect. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . . . all practicing lawyers know to be unmitigated fiction . . . ." (Quoted

in Bruton from Mr. Justice Jackson's statement in *Krulewitch* v. *United States,* 336 US 440, 453.)

The petitioner was just as helpless in the face of these declarations as he would have been had a co-defendant's confession involving him been read, as in Bruton. And he was harmed thereby in exactly the same manner.

And the remedy; as in Bruton, was the granting of the motion for severance.

(6)

The petitioner is guaranteed the right to compulsory process for obtaining witnesses by the Sixth Amendment. *Washington* v. *Texas,* 388 US 14. (1967). Of what value is this right, or the right to have counsel, or the right to produce all proofs, that may be favorable to him (Declaration of Rights, Mass. Constitution Article XII), if such witnesses when obtained, such proofs when produced, however apposite, may not be presented by the counsel provided. Such a result manifestly does violence to those fundamental principles of liberty and justice acknowledged by all, whether the provisions of the Bill of Rights be incorporated in the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment as applied to the states, or whether those clauses are regarded in such a light that ". . . . each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects." Mr. Justice Harlan, dissenting, *Duncan* v. *Louisiana,* 20L Ed 2d 491. (1968).

The exclusion of this obviously material and technically admissible testimony by the witness Murdock, especially as part of the pattern described in (4), supra, deprived Connor of his basic and fundamental rights, especially that most basic of all principles in criminal prosecu-

tions, that by the law of the land he was entitled to a fair trial.

(7)

These paragraphs are important not because they allege irregularities, unconstitutional irregularities (as to everybody), which were prejudicial to Connor, though they may have been, but because these irregularities were part of the pattern of arbitrary disregard and denial of the defendants' rights previously described, in (4).

For the petitioner
JAMES J. TWOHIG

(Note: For pertinent statutes and constitutional provisions, see the following pages.)

PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

Massachusetts Statutes:

G.L. c. 263, s.4
G.L. c. 277, s.19
G.L. c. 277, s.35
G.L. c. 277, s.35A
G.L. c. 277, s.40

Massachusetts Declaration of Rights, Constitution:

Part the First, Article XI
Part the First, Article XII
Part the First, Article XIV

United States Constitution:

Amendment 5
Amendment 6
Amendment 14, Section 1

Massachusetts Statutes

G.L. c. 263, s.4: No person shall be held to answer in any court for an alleged crime, except upon an indictment

by a grand jury or upon a complaint before a district court or in proceedings before a court-martial.

G.L. c. 277, s.19: If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent state of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.

G.L. c. 277, s.35: A defendant shall not be acquitted on the ground of variance between the allegations and proof if the essential elements of the crime are correctly stated, unless he is thereby prejudiced in his defence.

G.L. c. 277, s.35A: Upon motion of the district attorney or prosecuting officer, the court may order the complaint or indictment amended in relation to allegations or particulars as to which the defendant would not be prejudiced in his defence.

G.L. c. 277, s.40: The court may, upon arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged, and if it has final jurisdiction of the crime, shall so order at the request of the defendant if the charge would not be otherwise fully, plainly, substantially and formally set out. If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial, which may be before the same or another jury, as the court may order. If, to prepare

for his defence, the defendant desires information as to the time and place of the alleged crime or the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money, or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid.

MASSACHUSETTS CONSTITUTION

Part the First, Article XI: Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Part the First, Article XII: No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Part the First, Article XIV: Every subject has a right to be secure from all unreasonable searches, and seizures,

of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, tc make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

United States Constitution

Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MISC. CIVIL NO. 68-88-G

JAMES J. CONNOR,
PETITIONER,
v.
PHILIP J. PICARD, Superintendent,
Massachusetts Correctional Institution, Norfolk,
RESPONDENT.

OPINION

January 16, 1970

GARRITY, J. Petitioner for habeas corpus, Connor, and a codefendant Landry were found guilty on March 25, 1966 of murder in the first degree of Davis. The crime was committed on May 1, 1965. The jury recommended that the death penalty not be imposed and petitioner is serving a life sentence. Codefendants named Doherty were found guilty of being accessories. Petitioner's conviction was affirmed on appeal, *Commonwealth* v. *Doherty,* 353 Mass. 197, decided August 22, 1967.

The petition for habeas corpus asserts seven numbered grounds for relief, but without specifying in some instances the federal constitutional right relied upon and the exhaustion of available state remedies regarding the particular claim. Accordingly, the court entered an order limiting the hearing to reasons (1) and (3) unless the petitioner should file prehearing statements showing his exhaustion of state remedies with respect to certain grounds and the federal constitutional nature of others. No such statements were received from petitioner previous to the hearing, but at the hearing on the petition for the writ, on motion of the petitioner, leave was granted to include such statements in a brief to be submitted after the hearing. The effect of the

court's limiting order, as modified by allowance of the petitioner's motion at the hearing, has been to exclude from the court's consideration three of the seven grounds asserted in the petition, numbers (2), (4) and (5).[1] At the hearing in this court, the petitioner was represented by the same attorney who represented him at the trial and in the Supreme Judicial Court on appeal.

Findings of Fact

The evidence at the trial was to the effect that shortly before 3:00 A.M. on May 1, 1965 petitioner and Landry came to the third floor apartment in Boston in which Davis was killed in response to urgent telephone calls from the Dohertys that Davis was threatening them and their children with two revolvers. Before Connor and Landry arrived, Davis had fallen asleep on a couch in the den and had been disarmed by Mr. Doherty. When they arrived at the house, Connor and Landry rushed up the stairs and Mrs. Doherty pointed to the sleeping or dozing Davis as the one who had been threatening her family. Landry put a shotgun in Davis's belly and said, "Hey, hey" twice and, as Davis was awakening, shot him in the belly. Landry and Connor picked Davis up, one under each arm, dragged him to the doorway and let him drop down the stairs. Davis was left sprawled out on the front porch dead.

Two witnesses identified petitioner as having accompanied Landry. One of them, Betty Moore, was a boarder occupying a room in the Doherty apartment and the other was her friend, Ronald Hayes. Codefendant Mrs. Doherty testified that petitioner was not at her house on the night of the crime. Connor did not testify, but took advantage

[1] One of the excluded grounds, number (4), was nevertheless briefed by the petitioner and has been considered by the court. It claims prejudice from denial of petitioner's motion for severance because a bill of particulars filed in the case against one of the codefendants contained an allegedly inflammatory description of the killing. This ground is obviously without merit.

of the now unique Massachusetts practice, see *United States* v. *Cartano, etc.*, No. 7325, 1 Cir., Jan. 12, 1970, of making an unsworn statement to the jury in which he said he was not on the premises on the night of the crime.

The grand jury received evidence in June 1965 but took no action. It received further evidence in August and returned an indictment on August 4, 1965 charging Landry "and John Doe . . ." with the murder. On August 9 the Commonwealth filed a motion to amend the indictment by substituting petitioner's name for John Doe and the motion was allowed after a hearing at which no evidence was introduced.

During the period of approximately seven months between the indictment and the trial, defendants endeavored without success to interview Betty Moore, who was held in protective custody by the prosecution. Petitioner also sought to obtain a copy of her testimony before the grand jury in support of his motion to quash and dismiss the indictment on the ground that no evidence before the grand jury indicated that he was the "John Doe" intended to be arrested.

At the trial petitioner and other defendants unsuccessfully sought disclosure by the prosecution of Moore's grand jury testimony, after she had admitted on cross-examination that she had testified falsely before the grand jury in June 1965. She testified that she had committed perjury before the grand jury in June because of threats by a relative of the Dohertys and that she told the truth to the grand jury in August. When the defendants, including the petitioner, moved that the prosecution be required to furnish the defense with a transcript of Moore's testimony before the June grand jury, the trial judge denied the motion explaining that the method which should be pursued by the defendants was to get the stenographer who had transcribed the grand jury minutes. The judge

suggested that the prosecution attorney find out during recess the name of the stenographer and let defense counsel know so that they might bring the stenographer to the trial. So far as appears, none of the attorneys took any action in line with the court's suggestion. During further crossexamination, the defense attorneys elicited repeated admissions from witness Moore that she had committed perjury before the grand jury in June. The contents of Moore's grand jury testimony were undisclosed in the state courts and not offered in evidence in this court.

Conclusions of Law

The only substantial issue presented by the petitioner is the first part of ground (3) relating to petitioner's failure to obtain a copy of Betty Moore's testimony before the June grand jury. We shall therefore first discuss summarily grounds (1), (6) and (7) and the second part of ground (3). Ground (1) is that the amendment of the indictment to substitute Connor's name for John Doe was a violation of the Fifth Amendment of the Constitution of the United States.[2] But it is well settled that the due process clause of the Fourteenth Amendment does not make applicable to the states the grand jury requirement of the Fifth Amendment. *Hurtado* v. *California*, 1884, 110 U.S. 516, *Beck* v. *Washington*, 1962, 369 U.S. 541, 545. The second part of ground (3) is that petitioner's counsel was denied the opportunity of interviewing material witnesses in the same manner as the prosecution, to which they were constantly available. Apart from its having scant sup-

[2] In support of this and all other grounds for relief, petitioner has argued indiscriminately on the basis of the statutes and constitution of the Commonwealth of Massachusetts, as well as upon federal grounds. No effort has been made in the petition or in petitioner's brief to particularize the federal rights allegedly violated in the state courts apart from general references to various provisions of the federal Bill of Rights and the Fourteenth Amendment.

port in the record and petitioner's reliance in this regard upon the Massachusetts Declaration of Rights, petitioner failed to object to the rulings of the judges of the Superior Court when the matter was brought before them in pretrial hearings and did not claim error on this score in the Supreme Judicial Court. He has probably waived this ground. In any event, he has not exhausted available state court remedies.[3] Ground (6) is that the trial court erred in excluding a certain line of questioning on crossexamination of witness Moore designed to test her credibility. Despite this court's orders before and at the hearing, petitioner's brief does not attempt to show the involvement of a federal constitutional right in this contention apart from the general statement that trial procedures must be fundamentally fair. If there was error, it does not approach constitutional dimensions. Ground (7) is likewise illusory. It alleges an error in the case against codefendants Doherty, which the petition asserts was prejudicial to petitioner because severance was not ordered. Despite this court's orders, petitioner has made no attempt to demonstrate an exhaustion of available state court remedies with respect to this ground. 28 U.S.C. § 2254. Furthermore, this ground was virtually abandoned in petitioner's brief in this court, which devotes but a single sentence to the point, including a surprising disclaimer of prejudice to the petitioner.

The issue with respect to petitioner not having received a transcript of Betty Moore's testimony before the June 1965 grand jury, denominated the first part of ground (3), was preserved at the trial and argued on appeal. It has not been disputed by the Commonwealth that the petitioner demonstrated a "particularized need",

[3] Codefendants did preserve a similar point on appeal without success. However, this does not excuse petitioner from seeking relief in the state courts because this ground involves a consideration of facts and circumstances of the case as they relate to a particular defendant.

Pittsburgh Plate Glass Co. v. *United States,* 1959, 360 U.S. 395, 400, for disclosure of Betty Moore's grand jury testimony inasmuch as she admitted perjury before the June grand jury. Regarding defense counsel's demand at the trial that the transcript be made available to them for purposes of further crossexamination, it should be noted first that the *Pittsburgh Plate Glass Co.* case did not decide whether such a procedure should be followed or whether the trial judge should examine the transcript *in camera* to ascertain the nature of the inconsistencies between the witness's testimony at trial and previously. *Dennis* v. *United States,* 1966, 384 U.S. 855, 875, holding that the determination of what may be useful to a defendant can properly and effectively be made only by an advocate, was not decided until June 20, 1966, approximately three months after the completion of petitioner's trial. However, in *Commonwealth* v. *Ladetto,* 1965, 349 Mass. 237, 244-245, the Supreme Judicial Court anticipated the holding in *Dennis* and, on petitioner's appeal, applied the *Dennis* principle in deciding the discovery question against him, two justices dissenting. The Supreme Judicial Court held that the trial judge did not deprive the petitioner of access to the minutes of the June grand jury and that counsel's failure to pursue the course indicated by the trial judge, of procuring the attendance of the grand jury stenograprer, was responsible for any prejudice to him.

In this court both parties have argued the question of the proper application of the *Dennis* rule without alluding to the necessary consideration whether it applies to criminal trials in state courts under the due process clause of the Fourteenth Amendment. It seems clear that it does not, because not "fundamental" nor "necessary to an Anglo-American regime of ordered liberty." See *Duncan* v. *Louisiana,* 1968, 391 U.S. 145, 149-50 n. 14. The Supreme Court based its decision in *Dennis* upon its super-

visory powers over federal district courts and not upon a constitutional right of the accused. *Broeckel* v. *Green,* N.D. Ohio 1967, 298 F.Supp. 249, 253. Discovery rights such as inspection of grand jury minutes are not of constitutional origin and they represent exceptions to the general rule concerning discovery in criminal cases, *Corbett* v. *Patterson,* D. Colo. 1967, 272 F.Supp. 602, 609. There has been no hint in Supreme Court cases that this procedure of disclosing grand jury minutes was thought to be compelled by the due process clause of the Fifth Amendment. *United States* v. *Lavallee,* 2 Cir. 1965, 344 F.2d 313, 315. Nor has there been any suggestion that the rule of the *Dennis* case should be applied retroactively.

Therefore any error by the courts of Massachusetts in deciding whether petitioner was entitled at trial to disclosure of witness Moore's grand jury testimony, at least as asserted by petitioner in the Supreme Judicial Court and in this court,[4] involved the interpretation of a rule of state law and not a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). With respect to the scope of federal habeas corpus jurisdiction, the identity of the state and federal discovery rules is immaterial.

Accordingly it is ordered that the petition be denied and the case dismissed.

(s) W. Arthur Garrity, Jr.
United States District Judge

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[4] In *United States* v. *Lavallee*, *supra*, at 315, it is stated, "It could be argued with some force that when the Grand Jury testimony is exculpatory and the trial testimony inculpatory . . . failure to make the Grand Jury testimony available on request is within the principle of decisions holding it to be a denial of due process for the prosecutor to fail to disclose known exculpatory evidence to the defense. *Brady* v. *Maryland*, 373 U.S. 83 [and other cases]." We intimate no opinion on any such contention in this case. Suffice it to note that the point has never been raised by petitioner in the Massachusetts courts. See *Lamoureux* v. *Comm. of Mass.*, 1 Cir. 1969, 412 F.2d 710, 711.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED IN PRINTING]

ORDER OF DISMISSAL

[January 19, 1970]

GARRITY, D.J.

This cause having come on for hearing on petition for a writ of habeas corpus and in accordance with the Court's Opinion dated January 16, 1970, it is hereby ORDERED

PETITION DENIED; CASE DISMISSED.

Dated at Boston, Massachusetts, this 19th day of January, 1970.

By the Court,
(s) KATHLEEN M. DOLAN
Deputy Clerk

(s) W. ARTHUR GARRITY, JR.
United States District Judge

DATE: January 19, 1970

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY SUPERIOR COURT

No. 19494

COMMONWEALTH *vs.*
DONALD E. LANDRY, alias EMO LANDRY,
JOHN DOE (8/9/65 true name JAMES J. CONNOR)

Offense
Murder-First Degree

Attorney	
8/9/65	9/13/65
James J. Twohig	Joseph J. Balliro
507 Broadway	44 School St.
South Boston	(for Landry)
(for Connor)	

Date of Filing

Aug. 4, 1965 Indictment returned.

Aug. 5, 1965 Copy of indictment and notice of finding of indictment sent to the Chief Justice and Attorney General.

Copy of indictment, notice of finding of indictment and that indictment would be entered forthwith on docket of this Court sent by Clerk to Sheriff for service on Landry in Common Jail.

Notice sent to Department of Mental Health as to Landry.

Aug. 9, 1965 Commonwealth's motion to amend indictment by substituting name of James J. Connor in place of John Doe, filed and allowed. Tauro, C.J. — Lotreck, stenographer.

Aug. 10, 1965 Copy of indictment and notice of finding of indictment sent to Chief Justice and Attorney General.

Copy of indictment, notice of finding of indictment and notice that indictment would be entered forthwith on docket of this Court sent by Clerk to Sheriff for service on John Doe, true name James J. Connor. Notice sent to Department of Mental Health as to Connor.

Court orders writ of habeas corpus to issue to Massachusetts Correctional Institution, Walpole, for appearance of Landry on August 13, 1965. Tauro, C.J. Writ Issued.

Entry of August 9, 1965 corrected so as to read as follows: Commonwealth files motion to amend indictment.

Court (Tauro, C.J.) having determined that true name of John Doe has been discovered to be James J. Connor, orders the name James J. Connor to be entered on record as true name. Goldberg, stenographer.

Aug. 12, 1965 Order of notice with return of service on Connor endorsed thereon received from Sheriff.

Connor's petition for assignment of James J. Twohig, Esquire of Boston, as counsel, filed.

James J. Twohig files affidavit in accordance with Rule #95.

Aug. 13, 1965 Connor brought into Court from Jail — Connor's petition for assignment of James J. Twohig, as counsel allowed. Connor pleads not guilty — Court allows Connor thirty days for filing special pleas.

Connor's motion for permission to engage an investigator in sum not to exceed $500, filed and allowed.

Connor ordered committed to Jail without bail. Tauro, C.J. — Lotreck, stenographer. Landry brought into Court from Massachusetts Correctional Institution, Walpole, on writ of habeas corpus.

Order of notice to Landry of finding of indictment and entry on docket read to Landry by Deputy Sheriff, James D. Collins and attested copy of same delivered to him — Landry returned to Massachusetts Correctional Institution, Walpole.

Aug. 17, 1965 Report received from Department of Mental Health as to Landry.

Aug. 23, 1965 Writ of habeas corpus issued to Massachusetts Correctional Institution, Walpole, for appearance of Landry on August 24, 1965. Tauro, C.J.

Aug. 24, 1965 Connor's motion to inspect Grand Jury minutes filed, and denied without prejudice.

Connor's motion for admission to bail filed,

after hearing denied. Landry brought into Court on writ of habeas corpus — Court (Tauro, C.J.) grants continuance to September 7, 1965, at request of Landry. Schwartz, stenographer.

Sept. 8, 1965 Writ of habeas corpus issued to Massachusetts Correctional Institution, Walpole, for appearance of Landry on September 13, 1965.

Connor files motion for particulars — motion for names of witnesses — motion for copy of autopsy report.

Sept. 9, 1965 Hearing on Connor's motions filed September 8, 1965 to be held on September 15, 1965 at 10:00 A.M. Tauro, C.J. — Connor and parties notified.

Sept. 9, 1965 Lotreck, stenographer.

Sept. 10, 1965 Connor files motion to quash — motion to dismiss.

Sept. 13, 1965 Landry brought into Court on writ of habeas corpus — hearing on matter of assignment of counsel for Landry — Court (Hudson,J.) assigns Joseph J. Balliro, Esquire, as counsel, for Landry subject to the filing of affidavit in compliance with Rule #95 of the Superior Court, Landry assenting thereto.

Landry pleads not guilty.

Lotreck, stenographer.

Sept. 15, 1965 Connor brought into Court — hearing on Connor's motion for particulars — motion for names of witnesses — motion for copy of autopsy report — motion to quash — motion to dismiss.

Court allows motion for copy of autopsy report; all other motions taken under advisement. Paquet,J. — Mahaney, stenographer, sworn to take testimony.

Sept. 17, 1965 Affidavit of Joseph J. Balliro, Esquire, filed in accordance with Rule #95.

Sept. 24, 1965 Court denies Connor's motion to dismiss; denies motion to quash, with prejudice; allows motion for names of witnesses only as to those witnesses sworn before Grand Jury.

Court orders that said list of witnesses be otherwise impounded until further order of Court.

Connor's motion for particulars allowed as to Nos. 24 and 32; so much of No. 25 as pertains to a description of the weapon, if any; and so much of No. 31 as pertains to a place or location of alleged crime; motion is otherwise denied as to each and every other request for particulars. Paquet, J.

Sept. 28, 1965 Attorney Twohig and District Attorney notified.

Sept. 30, 1965 Connor files exceptions to rulings on motion for particulars — exceptions to ruling on motion to quash — exception to ruling on motion to dismiss. Paquet, J., notified.

Oct. 4, 1965 Landry files motion to dismiss — motion for severance — motion to strike — motion for written bill of particulars — motion for names of witnesses — motion to be permitted access to witnesses — motion

for permission to engage an investigator — motion for inspection of Grand Jury minutes — motion to inspect and copy documents — motion for copy of autopsy report.

Oct. 21, 1965 Commonwealth files list of witnesses in compliance with Court's order of September 24, 1965. List impounded per order of Court. Paquet, J.

Nov. 1, 1965 Commonwealth files answers to Connor's motion for particulars.

Nov. 4, 1965 Landry's motion to strike, after hearing, denied — motion to dismiss, after [Illegible] motion for severance; motion to strike out certain particulars of hearing, taken under advisement. Murray, J. — Lotreck, stenographer.

Nov. 10, 1965 Commonwealth files answers to Landry's motion for written bill of particulars.

Landry's oral motion that Commonwealth further specify as to item 1, after hearing, denied.

Landry's motion to dismiss denied. Murray, J. — Lotreck, stenographer.

Nov. 19, 1965 Commonwealth files motion for assignment of trial date.

Nov. 22, 1965 Court orders issuance of writ of habeas corpus to Massachusetts Correctional Institution, Walpole, for appearance of Landry on November 24, 1965. Writ issued. Kalus, J. — Lotreck, stenographer.

Nov. 23, 1965 Connor files motion to strike out certain particulars of the Commonwealth and for further particulars — motion for the present addresses of the witnesses before the

	Grand Jury and for opportunity to interview each witness.
Nov. 24, 1965	Landry and Connor brought into Court — Court (Kalus, J.) orders Commonwealth's motion for assignment of trial date be referred to Justice Murray. Lotreck, stenographer.
Jan. 12, 1966	Writ of habeas corpus issues to Massachusetts Correctional Institution, Walpole for appearance of Landry on January 17, 1966.
Jan. 17, 1966	Connor files motion for severance — motion to inspect and copy documents. Hearing on Connor's motion to inspect and copy documents — Connor waives so much of motion starting with the words "which statements" and ending with the words "in the indictment" as contained in item 4. Motion as amended by waiver, allowed. Tauro, C.J. — Lotreck, stenographer.
Feb. 3, 1966	Court (Tomasello, J.) orders issuance of writ of habeas corpus to Massachusetts Correctional Institution, Walpole, for appearance of Landry on February 9, 1966. Writ issued.
Feb. 9, 1966	Landry brought into Court on writ of habeas corpus — Connor brought into Court. After hearing, Landry's motion for severance and motion for inspection of Grand Jury minutes denied; motion to be permitted access to witnesses; motion for names of witnesses sworn to testify before Grand Jury and motion for permission to engage an investigator allowed; motion to inspect and copy documents, al-

lowed as to so much of motion as relates to inspection and copying of documents that are written in form that may relate themselves as to whether or not they might be confessions by the co-defendants in this case.

Statements made by co-defendants may be included, if reduced to writing. Landry's motion for copy of autopsy report waived in open Court. Landry's motion to suppress filed, after hearing, denied — motion to be permitted access to witnesses filed, after hearing, allowed. Conner's motion for severance; motion to strike out certain particulars of Commonwealth and for further particulars — motion for present addresses of witnesses before Grand Jury and for opportunity to interview each witness, after hearing, denied.

Motion for permission to engage a psychiatrist waived in open Court (subject to report from Department of Mental Health.) Tomasello, J. — Hanron, Stenographer.

Feb. 10, 1966 Department of Mental Health notified as to Connor.

Feb. 21, 1966 Report received from Department of Mental Health as to Connor.

Mar. 7, 1966 Court assigns Thursday, March 10, 1966, for hearing on Landry's motion to be permitted access to witnesses.

Court orders issuance of writ of habeas corpus to Massachusetts Correctional Institution, Walpole, for appearance of Landry on Thursday, March 10, 1966. Writ issued.

Commonwealth's request for issuance of certificate for out-of-state witness filed, after hearing, allowed. Tomasello, J. Certificate issued.

Mar. 10, 1966 Landry brought into Court on writ of habeas corpus — Connor brought into Court. Landry files motion to strike Commonwealth's answers to defendant William R. Doherty's written bill of particulars; motion to strike Commonwealth's answers to defendant Janice M. Doherty's written bill of particulars; motion to dismiss. After hearing, each motion denied.

Court allows Landry to renew his motion for severance, after hearing; motion denied Court allows Connor to renew his motion for severance and motion to inspect Grand Jury minutes. After hearing, each motion denied. Tomasello, J. Schwartz, stenographer.

Mar. 14, 1966 Landry brought into Court on writ of habeas corpus — Connor brought into Court. Landry's and Connor's motions to have the following questions asked of prospective Jurors — second motion to dismiss filed, after hearing, each motion denied. Tomasello, J.

Commonwealth moves for trial as to each defendant.

Certificate of protracted trial filed.

Court orders jury impanelled of fourteen members.

Trial as to each (with indictments Nos 18314, 19465, 19466 and 19495) under provisions of General Laws (Ter. Ed.) Chap-

ter 278, Sections 33A to 33G inclusive, as amended, before Tomasello, J.

Baker, Gibbons and Schwartz, official stenographers, assigned to take testimony. Court (Tomasello, J.) orders that daily copy of transcript be prepared — one for Court — one for District Attorney — one for each defendant at expense of the Commonwealth.

Mar. 16, 1966 Connor files motion to suppress evidence. Certificate of public convenience that Court be open Saturday, March 19, 1966, filed.

Mar. 22, 1966 Connor's motion to suppress, after hearing, denied. Tomasello, J.

Mar. 24, 1966 Landry's and Connor's motions for mistrial — motions for directed verdicts of not guilty filed, after hearing, each motion denied. Tomasello, J.

Mar. 25, 1966 There remaining fourteen members of the jury originally impanelled at the time of final submission of the case, by direction of the Court, the names of two Jurors were withdrawn and said Jurors were discharged from further consideration of the case. Court (Tomasello, J.) orders that said Jurors remain in custody of Officers until verdicts returned.

Mar. 26, 1966 Verdict guilty as to each defendant, with recommendation that death sentence be not imposed.

Each defendant's oral motion that Jurors be polled, denied.

Commonwealth moves for sentence as to each defendant.

Landry sentenced to Massachusetts Cor-

	rectional Institution, Walpole, for and during the term of his natural life, to be served concurrently with sentence Landry is now serving at said Massachusetts Correctional Institution.
	Connor sentenced to Massachusetts Correctional Institution, Walpole, for and during the term of his natural life. Tomasello, J. — Mittimuses issued. Schwartz, Baker and Gibbons, stenographers.
Mar. 28, 1966	Landry's claim of appeal filed.
Mar. 29, 1966	Connor's claim of appeal filed.
Apr. 7, 1966	Court orders that two copies of transcript be prepared for the Supreme Judicial Court.
	Notice of Court's order re: transcript sent to Lotreck, Goldberg, Mahaney, Hanron, Gibbons, Baker and Schwartz, stenographers.
Apr. 20, 1966	Two copies of transcripts (August 13, 1965; September 13, 1965; November 4, 1965 and January 17, 1966) delivered to Clerk by Lotreck, stenographer.
Apr. 21, 1966	Two copies of transcript (February 9, 1966) delivered to Clerk by Hanron, stenographer.
Apr. 22, 1966	Two copies of transcript (September 15, 1965) delivered to Clerk by Mahaney, stenographer.
Apr. 26, 1966	Two copies of transcripts (August 24, 1965; March 10 and March 14, 1966) delivered to Clerk by Schwartz, stenographer.
May 9, 1966	Two copies of transcript (for March 14, 1966 through March 26, 1966) delivered to Clerk by Baker, stenographer.

	Two copies of transcript (for August 9, 1965) delivered to Clerk by Lotreck, stenographer.
May 19, 1966	Request for designation of pleadings sent to Attorney Twohig for Connor and Attorney Balliro for Landry and to M. Reiser, Assistant District Attorney.
May 25, 1966	Landry's request to be allowed to and including June 29, 1966 for filing designations of pleadings and motions filed.
May 26, 1966	Landry's request to be allowed to and including June 29, 1966 for filing designations of pleadings and motions, allowed. Kalus, J.
June 29, 1966	Attorney Balliro for Landry and Attorney Twohig for Connor, orally designates pleadings.
July 7, 1966	Written notice of completion of summary of record sent to Attorney of Record for each defendant.
	Clerk's certificate of notice filed.
July 11, 1966	Connor's and Landry's motions to be permitted a free copy of transcripts of pretrial hearing, filed and allowed. Tomasello, J.
	Lotreck and Schwartz, stenographers, notified of Court's order.
July 18, 1966	Connor's motion for extension of time for filing assignment of errors filed and allowed. Pecce, J.
	M. Reiser, Assistant District Attorney, notified.
	Landry files assignment of errors.
Aug. 5, 1966	Connor files assignment of errors.

Oct. 3, 1966	Record on appeal entered in Supreme Judicial Court. (Attorneys of Record notified)
Aug. 22, 1967	Rescript Received from Supreme Judicial Court: — "Judgment Affirmed as to Landry and Connor". [Paper #17 in #18314]. All parties notified.
Dec. 13, 1967	Motion of the defendant, James J. Connor for a Transcript of the Trial without cost, filed. Submitted to Court, Rose, J. — after hearing allowed. Rose, J. — Brown, stenographer. [Stenographers Schwartz, Baker and Gibbons notified] [Stenographers Lotreck, Goldberg, Mahaney and Hanron notified on February 7, 1968]
Dec. 15, 1970	Connor's motion that he be admitted to bail, filed

SUFFOLK COUNTY SUPERIOR COURT

No. 19494

COMMONWEALTH

vs.

DONALD E. LANDRY, alias, et al.

MURDER — FIRST DEGREE

August Sitting, 1965

Attorney for Defendant

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. At the SUPERIOR COURT, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August in the year of our Lord one thousand nine hundred and sixty-five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

DONALD E. LANDRY, otherwise known as EMO LANDRY, and JOHN DOE, the true name and a more particular description of the said John Doe being to the said Juros unknown,

on the first day of May, in the year of our Lord one thousand nine hundred and sixty-five, did assault and beat one Robert W. Davis with intent to murder him, and by such assault and beating did kill and murder the said Robert W. Davis.

A TRUE BILL

MURRAY P. REISER
Assistant District Attorney

CLIFTON A. GASKILL
Foreman of the Grand Jury.

A true copy
Attest:
(s) JOHN P. SWIFT, *Asst. Clerk*

August 4, 1965
Returned into said Superior Court by the Grand Jurors and ordered to be filed.
Attest:

EDWARD V. KEATING, *Clerk.*

A true copy
Attest:

....., *Clerk.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss. Superior Court

19494

[TITLE OMITTED IN PRINTING]

MOTION TO AMEND INDICTMENT.

NOW Comes the Commonwealth in above entitles action and moves this honorable court that the name John Doe be stricken from the above indictment wherever it appears and the name James J. Connor be substituted wherever the name John Doe appears.

FOR THE COMMONWEALTH
(s) MURRAY P. REISER
MURRAY P. REISER
Asst. Dist. Atty.

Filed Aug 9.1965
Allowed & exception saved.
TAURO, C.J.

SUFFOLK COUNTY Superior Court
No. 19494
WARRANT ON INDICTMENT
August 4, 1965.
COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, TO WIT:

To the Sheriff of said County of Suffolk, his Deputies, the Police Officers of the City of Boston in said County, the Officers of the Court hereinafter named and all other officers authorized to serve criminal process in said Commonwealth

GREETING:

WHEREAS, the Grand Inquest for the Commonwealth of Massachusetts, at the Superior Court for the transaction of Criminal Business, which was begun and holden at Boston within and for the County of Suffolk on the first Monday of August, in the year of our Lord one thousand nine hundred and sixty-five did upon their oaths present, that

JOHN DOE, the true name and a more particular description of the said John Doe being to the said Jurors unknown,

on the first day of May A.D. 1965 at said Boston, did commit the crime of

Murder in the First Degree

These are therefore in the name of the Commonwealth of Massachusetts to will and require you to apprehend the body of the said Doe if he may be found in your precinct and him forthwith carry before the said Superior Court or commit to the Common Jail in said County that he may be secured to answer to said presentment.

WITNESS, G. JOSEPH TAURO, ESQUIRE,
Chief Justice of said Court.

Dated at Boston aforesaid, this fourth day of August in the year of our Lord one thousand nine hundred

and sixty-five and sealed with the seal of said Court.

(s) MARY C. PHELAN
Assistant Clerk.

SUPERIOR COURT
FOR THE TRANSACTION OF CRIMINAL BUSINESS
Clerk's Office

Room No. 712, Court House
Pemberton Square

Boston, August 10, 1965

TO THE DEPARTMENT OF MENTAL HEALTH
IN THE COMMONWEALTH OF MASSACHUSETTS:

In accordance with the provisions of G.L. (Ter. Ed.) Chap. 123, Sec. 100A, I hereby notify you that the Grand Jurors in attendance upon said Court at the present August Sitting, returned an indictment against

James J. Connor

for the crime of murder in the first degree

and he is in custody in the Common Jail in said Boston.

JOHN P. SWIFT, *Assistant Clerk.*

No. 19494
A true copy
Attest:

(s) JOHN P. SWIFT, *Assistant Clerk.*

SUFFOLK, ss. BOSTON, August 6, 1965

In obedience to the within warrant, I have arrested the within-named defendant James J. Connor — and the Superior Court within named not being in session, I have committed him to the Common Jail within named.
Charles St.
and now have before the Court.

(s) JOHN E. BARRY
Police Officer of Boston
C.I.D. Headquarters

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY SUPERIOR COURT
[TITLE OMITTED IN PRINTING]
No. 19494

MURDER.
FIRST – SECOND – DEGREE.

August 10, Sitting, 1965

ORDER OF NOTICE TO PRISONER OF FINDING OF INDICTMENT AND ENTRY ON DOCKET

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court for the Transaction of Criminal Business.

August Sitting, A.D. 1965

To the Sheriff of our County of Suffolk
or any of his Deputies, GREETING:

WE COMMAND YOU that you notify John Doe, whose true name has been discovered to be James J. Connor, and has been entered upon the record by order of the Court on August 9, 1965, who is in the common jail in said County, that an indictment was found and returned into said Superior Court at the present August sitting, wherein said James J. Connor is charged with the crime of Murder, in the —FIRST—SECOND— degree, a true copy of said indictment is hereto annexed, and that said indictment will be entered forthwith upon the docket of the said Superior Court holden within and for said County of Suffolk.

And you, said Sheriff, or any of your Deputies, are further required to deliver to said Connor an attested copy of said indictment with an attested copy of this order.

Hereof fail not, and make return of this order with your doings thereon into said Superior Court.

Witness, G. JOSEPH TAURO, Esquire, Chief Justice of said Superior Court, and the seal of said Court, at said Boston, this tenth day of August in the year of our Lord one thousand nine hundred and sixty-five.

[SEAL] (s) JOHN P. SWIFT, *Asst. Clerk.*

SUFFOLK, ss. BOSTON, *August* 11, 1965

I have this day notified the within-named defendant, as directed herein, and delivered to him in hand an attested copy of the indictment with an attested copy of this order.

(s) FREDERICK SULLIVAN
Sheriff of Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court

[TITLE OMITTED IN PRINTING]

STENOGRAPHIC TRANSCRIPT OF HEARING ON MOTION TO SUBSTITUTE THE NAME OF JAMES J. CONNOR IN A JOHN DOE INDICTMENT

Before: TAURO, C. J.
Boston, Massachusetts
Monday, August 9, 1965.

APPEARANCES:

Murray Reiser, Assistant District Attorney, for the Commonwealth.

James J. Twohig, Esq., for the defendant Connor.

[1] *Monday, August 9, 1965*

Mr. Reiser: If Your Honor please, I have two motions just prepared by the Commonwealth. One is a motion to amend an indictment in the case of Commonwealth of Massachusetts vs. John Doe. At the time the indictment was returned, the District Attorney and the grand jury did not know the name of the defendant. Since the indictment has been returned, we have ascertained the name of the defendant.

The Court: Have you given a copy to counsel?

(Mr. Reiser gave Mr. Twohig a paper.)

The Court: Do you object to the allowance of the motion?

Mr. Twohig: Yes, I object to it.

The Court: For what reason?

Mr. Twohig: There's no information on which the name of John J. Connor be substituted. Apparently Connor was arrested because of the circumstances in which he was found, and because a vague description had been given to

the grand jury and on which John Doe had been indicted, and I see no additional evidence which justifies his being named here as defendant.

The Court: Well, the facts are that you have [2] a perfect defense to the offense, then. But not to this. This is a very common procedure.

Mr. Twohig: If Your Honor will save my exception.

The Court: Yes. Allowed. Exception is noted.

EXCEPTION No. 1.

Mr. Reiser: If Your Honor please, I now have a motion to inspect the premises where the crime was committed.

The Court: You don't represent the owner of the premises?

Mr. Twohig: No, Your Honor.

The Court: Allowed.

Mr. Twohig: Your Honor, on that motion, may counsel for the defendant accompany the District Attorney, Assistant District Attorney, in the inspection of those premises?

The Court: I think he is entitled to make an inspection.

Mr. Reiser: Yes, Your Honor. We're also going to send in a police officer to make a sketch about the area, for purposes of trial.

The Court: You make a motion.

[3] Mr. Reiser: Counsel can come in there at any time. We're going to send our own police officer in to sketch the area for the purposes of trial.

Mr. Twohig: I will bring my own motion, Your Honor.

The Court: You say in open court that you will notify counsel when you are going there, so that he may accompany you.

Mr. Reiser: Yes. We will go ourselves, first. I will go in myself. Later on, I am going to send in a police officer, who is a draftsman, who will then sketch out the area. I won't be there. The first time when I go, I will notify

counsel. The second time, we'll be sending in a police officer, drawing.

The Court: You're going there first?

Mr. Reiser: Yes.

The Court: When you go there, you notify counsel, so he can come with you.

Mr. Reiser: Yes.

The Court: Is that satisfactory?

Mr. Twohig: Yes.

The Court: Anything else?

Mr. Reiser: Nothing else, Your Honor.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss Superior Court

[TITLE OMITTED IN PRINTING]

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS ON ARRAIGNMENT OF DEFENDANT

Before: TAURO, C. J.
Boston, Massachusetts
August 13, 1965.

APPEARANCES:

Murray Reiser, Assistant District Attorney, for the Commonwealth.

James J. Twohig, Esq., for the Defendant Connor.

[A-1] *Friday, August 13, 1965*

Mr. Twohig: May it please the Court, I understand that the next matter in order for consideration is Commonwealth against James Connor. I have a paper for Your Honor's consideration, preliminary to his arraignment. You've got a copy of that.

Mr. Reiser: What is that on — appointment of counsel?

Mr. Twohig: Yes. There's also an affidavit of my own, Your Honor.

The Court: Allowed.

Mr. Reiser: Your Honor please, may the defendant James J. Connor be arraigned?

The Court: Yes.

The Clerk: James J. Connor, this indictment returned against you on August 4, states that..... (The Clerk read Indictment No. 19494.)

On August 9, 1965, the Commonwealth filed a motion to amend indictment. The Court (Tauro, Chief Justice), on the above motion, having determined that the true name of the defendant has been discovered to be James J. Connor, ordered the name James J. Connor to be entered on the record as the true name of the defendant.

[A-2] What say you, James J. Connor to this indictment charging you with first-degree murder?

James J. Connor: Not guilty.

The Clerk: Are you guilty or not guilty?

James J. Connor: Not guilty.

Mr. Twohig: Your Honor, I have now motions for the consideration of the Court for the appointment of an investigator and the appointment of a psychiatrist.

The Court: Do you want to step forward?

Mr. Reiser: I don't think in this case, in view of the particular case, the Commonwealth recommends there be no bail.

Mr. Twohig: Your Honor, if I may say this: I don't know what the facts are to which the District Attorney has alluded. No facts have been revealed in this case. Certainly the facts with relation to whatever identification, means of identification or description that the grand jury had before it of the man alleged to have committed the crime or to have been involved in the commission of the crime, are not. First the description in the paper which we have from the grand jurors is a complete blank. There is no such description. And apparently there is no description in the

hands of officers who arrested this man subsequent to his indictment on [A-3] August 4, I believe. Now, the witnesses before the grand jury, according to my information, were the same witnesses and appeared there no less than three times between May 1 and the date when Connor — or, rather, when Landry was indicted. Connor cannot be regarded as having been indicted in this case until August 9 Monday of this week, when the indictment was amended to include his name.

When the officers went to the home of Landry to investigate, they did not know the name of James J. Connor. They had no description of James J. Connor that appears on any record, and I believe they had no description at all. On the date when they arrested him, just a few days after the indictment on August 4, he was arrested in the apartment of Landry, where he was in company with three or four other friends, including, I believe, the wife of Landry.

Now, Your Honor, at that time, he was in company with another man of his size and description, and these police officers asked them who they were, asked them to identify themselves, which they did. The police officers did not know them by name, any more than they knew them by their appearance or by any description. Eventually, after long conversation, the police officers decided to arrest them because they were the only two men present, [A-4] and they took them to Police Headquarters. Now, both these men were detained at Police Headquarters for quite a number of hours — six or seven hours, I believe — and both of them were under arrest, Your Honor, as the same John Doe. Nevertheless, they were required to release one of them, the man who was with Connor, because of the fact that that man was known to have been in another place, a place of incarceration in this Commonwealth, on the date of the crime, so it couldn't have been him, obviously.

Connor was held, not on description, Your Honor, but on suspicion, and since the name of John Doe, on suspicion.

Now, Your Honor, this crime is alleged to have occurred on May 1 of this year. The man in whose apartment that this occurred was brought to Dorchester Court almost immediately afterward. He pleaded not guilty. He was put in Charles Street Jail, where he still is. In the meantime, the charge against him has been reduced to that of accessory. He has been before the grand jury, and other witnesses have been before the grand jury, but they are the same witnesses, and the three times that they were before the grand jury on this case, they were never able to furnish any description or any name of James J. Connor — [A-5] no nickname, no real name, no identification of any kind. He was not named until after he was arrested, until after the Commonwealth had a suspect.

The circumstances under which he was arrested are very peculiar. When the police officers entered the apartment, they entered through the front door. They were admitted. There was no attempt to keep them out. There was a back door to the apartment. Connor did not flee. Connor remained there. Connor had not made any attempt to lead anything other than the normal life that he always led since May 1. He has not left the Commonwealth, he has not hidden, he has not been aware, apparently, of any connection between any friend of his and this crime; and it came as a complete surprise to him when he was arrested; so I think the circumstances in this case, Your Honor, are of a nature quite other than that which might justify his being held without any bail whatsoever. This defendant has no fear of conviction in this case, and no reason to run away, and consequently, Your Honor, I think he recommends himself to your consideration for bail.

The Court: Are you aware of his record?

Mr. Twohig: Yes, Your Honor, I'm aware of his record. I'd like to point out to Your Honor that he has [A-6] never been convicted of a crime of violence, to my knowledge.

The Court: Well, the only thing before me is an affidavit that this man is John Doe. I cannot go into his guilt or lack of guilt.

Mr. Reiser: Without violating the secrecy of the grand jury, I think my brother is misrepresenting the facts. I wasn't there when he was arrested, but I understand he attempted to flee. Based on these facts, the Commonwealth highly recommends there be no bail.

Mr. Twohig: The District Attorney's office almost invariably recommends no bail in cases of this kind, but Your Honor, I feel they should at least give you some information on which they justify. We still have nothing to Connor's discredit in this case.

The Court: I think the obvious fact is that the grand jury has indicted him for first-degree murder.

Mr. Twohig: They never indicted Connor, Your Honor.

The Court: That remains to be seen. That is a matter for trial, not on a motion for bail or reduction of bail.

Mr. Twohig: Your Honor, I don't like to seem persistent, but the record reveals that the grand jury knew [A-7] that there were at least two men involved, and that's all they knew. They must have had something.

The Court: Excuse me. Do you have the grand jury minutes?

Mr. Reiser: They're being typed up, Your Honor. They haven't been typed.

The Court: Well, as an officer of the court, do you state to me that counsel is in error?

Mr. Reiser. In certain things, not in all.

The Court: When will the minutes be ready?

Mr. Reiser: They're being typed up. Considerable time was spent in the grand jury in this case.

Your Honor, I'd like to approach the bench and supply the Court with information.

The Court: I don't think you should. I don't think it's proper.

Mr. Twohig: Your Honor, I understand that Your Honor would like to look at the minutes of the grand jury, and I will in the meantime prepare the motion for bail.

The Court: Well, for the time being, at least this Court will excercise its discretion and hold him without bail. If you want to renew your motion at a later date for bail, you may do so. In the meantime, if that motion is presented, I will look at the grand-jury minutes.

[A-8] Mr. Twohig: Thank you. Now, I have two other preliminary motions, one for the appointment of an investigator — I think this case will require some investigation, Your Honor; and perhaps Your Honor would consider this motion at this time, or hold it for further consideration.

The Court: This motion is allowed. I will not act upon the motion for an appointment of a psychiatrist until after there has been a finding.

Mr. Twohig: Very well, Your Honor.

The Court: And at that time you may renew this motion.

Mr. Twohig: Very well, Your Honor. Your Honor, I have a number of further motions I'd like to file — one for particulars, one for inspection of the grand-jury minutes; and may I have 30 days to file those motions?

The Court: You have 10 days, in any event.

Mr. Twohig: Yes. I would like to have 30 days.

Mr. Reiser: If Your Honor please, I suggest 15 days, for the reason that we'd like to advance this case for speedy trial.

The Court: When do you want to move trial?

Mr. Reiser: October 1.

The Court: That gives him plenty of time. Thirty days.

[A-9] Mr. Twohig: Your Honor, in view of the unusual aspects of this case, I doubt very much that a full investigation will be concluded by that time. Substantial work has to be done on it.

The Court: That remains to be seen. In the meantime, you may have 30 days for special pleas and motions.

Mr. Twohig: Thirty days. Thank you.

The Clerk: James J. Connor, you are ordered held without bail at the present time.

Mr. Reiser: That's all, Your Honor.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Paper No.15 No. 19494

[Title Omitted in Printing]

CONNOR'S MOTION TO QUASH

[Filed September 10, 1965]

Now comes the defendant and moves that this Honorable Court quash the indictment against him and assigns as his reasons the following:

1) That there is nothing in the said indictment to indicate that John Doe was ever described to the Grand Jury by any description, photographs, fingerprints, by any name or appellation whatsoever, or by any other manner or means.

2) That there is nothing in the warrant based upon said indictment to indicate by description, photographs, fingerprints, by any name or appellation whatsoever, or by any other manner or means, that the John Doe named in said indictment was intended by the Grand Jury to be indicted or to be arrested for the crime charged.

3) That, at the time of the arrest of the defendant, James J. Connor, the officers making the arrest did not have a warrant against him nor did they have a warrant against John Doe based on said indictment in their possession, nor did they have any reliable information upon which to base an arrest of the defendant, James J. Connor; and, that, therefore, said arrest was illegal and in violation of the Constitutions of Massachusetts and of the United States.

4) That the amendment of the indictment by motion of the office of the District Attorney subsequent to the arrest of James J. Connor was not an action of any Grand Jury nor based upon such action.

5) That no evidence has been presented to any Grand Jury since the arrest of James J. Connor for the purpose of obtaining a lawful indictment of said defendant.

6) That the defendant has never been indicted by a Grand Jury of this Commonwealth.

7) That on all of these facts James J. Connor has never been lawfully indicted for the crime charged in these proceedings in this Commonwealth.

For the defendant,
/s/ JAMES J. TWOHIG

Sept. 10, 1965—Filed
September 24, 1965—After hearing, the within motion is denied with prejudice.
/s/ WILFRED J. PAQUET
Justice Superior Court.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Paper No. 16 No. 19494

[Title Omitted in Printing]

CONNOR'S MOTION TO DISMISS

Now comes the defendant and moves that this Honorable Court dismiss the indictment against him and assigns as his reasons the following:

1) That there is nothing in the said indictment to indicate that John Doe was ever described to the Grand Jury by any description, photographs, fingerprints, by any name or appellation whatsoever, or by any other manner or means.

2) That there is nothing in the warrant based upon said indictment to indicate by description, photographs, fingerprints, by any name or appellation whatsoever, or by any other manner or means, that the John Doe named in said indictment was intended by the Grand Jury to be indicted or to be arrested for the crime charged.

3) That, at the time of the arrest of the defendant, James J. Connor, the officers making the arrest did not have a warrant against him nor did they have the warrant against John Doe based on said indictment in their possession, nor did they have any reliable information upon which to base an arrest of the defendant, James J. Connor; and that, therefore, said arrest was illegal and in violation of the Constitutions of Massachusetts and of the United States.

4) That the amendment of the indictment by motion of the office of the District Attorney subsequent to the arrest of James J. Connor was not an action of any Grand Jury nor based upon such action.

5) That no evidence has been presented to any Grand

Jury since the arrest of James J. Connor for the purpose of obtaining a lawful indictment of said defendant.

6) That the defendant has never been indicted by a Grand Jury of this Commonwealth.

7) That on all of these facts James J. Connor has never been lawfully indicted for the crime charged in these proceedings in this Commonwealth.

For the defendant,
/s/ JAMES J. TWOHIG

Sept. 10, 1965—Filed
September 24, 1965—After hearing, the within motion is denied with prejudice.
/s/ WILFRED J. PAQUET
Justice Superior Court.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

[TITLE OMITTED IN PRINTING]

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

[1] BEFORE: Paquet, J.

APPEARANCES:

Assistant District Attorney Murray Reiser,
for the Commonwealth.
James Twohig, Esquire,
for the Defendant.

September 15, 1965

[2] The Court: Yes, Gentlemen, let it appear, Mr. Stenographer, that the defendant James J. Connor—I take it this is Mr. James J. Connor?

Mr. Twohig: Yes, your Honor.

The Court: Is present in Court, represented by his counsel James J. Twohig, Esquire.

Now, there are five motions here.

Mr. Twohig: Yes, your Honor.

The Court: I notice number 14, motion for a copy of the autopsy report—

Mr. Reiser: I have agreed beforehand, your Honor, to give it to my Brother.

The Court: Are there any other reports of post-mortem examinations?

Mr. Reiser: The only thing I have is the autopsy report. I have it right here. Anything that I do acquire along that line I shall give it to my Brother.

The Court: What do you want me to do with this motion?

Mr. Reiser: You can allow it.

The Court: All right. Allow the motion for a copy of the autopsy report.

Now, there is a motion for particulars. Defendant's motion for names of witnesses. Motion to [3] quash; motion to dismiss. All right, I'll hear you, Mr. Twohig.

Mr. Twohig: First, your Honor, I'd like to take up the motion to dismiss and the motion to quash at one and the same time as they are identical and have been filed for procedural reasons which may or may not be well founded.

The Court: You say they are identical except they are named different?

Mr. Twohig: That's right, your Honor.

The Court: All right. I'll hear you.

Mr. Twohig: This case, your Honor, there was an indictment on August 2, I believe, the first Monday in August of this year which was returned by a Grand Jury after a hearing which was, I believe, the fourth hearing held by a Grand Jury on the matter of the alleged murder of Robert Davis. In this indictment two defendants were named. One of them was named as a particular person and the other one was named as a party unknown; John Doe. These are the words in the indictment: "John Doe the true name and a more particular description of the said John Doe being to the said Jurors unknown." Now, it's well established in this Commonwealth under Articles 12 and 14 of the Declaration of Rights that an indictment, or a complaint, must be [4] certain and precise in substance and in form. That has been stated in Jones against Robbins where Chief Justice Shaw said, "The right of individual citizens to be secure from an open and public accusation of crime and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a Grand Jury, in case of high offenses is justly regarded

as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty."

And Justice Pierce in Commonwealth against Harris—I didn't give you the citation on Jones against Robbins, I don't think, your Honor, it was 8 Gray, 329.

Commonwealth against Harris is 121 Northeastern 409 that is the citation I have on it. Said about the words of Chief Justice Shaw, "The above quotation is a declaration and decision that the twelfth article of the Bill of Rights in part was aimed and intended to prohibit the scandal and disgrace of a trial in public of persons charged with infamous crimes and offenses when, in truth, there was no sufficient cause to suspect their guilt."

Now, in Commonwealth against Phillips, your Honor, 16 Pickering, 211, it was said, "No subject [5] shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally described to him. The reasonable degree of certainty required in an indictment is so familiar, that it requires no authorities to support or illustrate it."

In the same case Chief Justice Shaw said, "But where, as in the present case, the complaint is the only basis of the proceedings, the only statement of the offense, where it is made to a court of record, not with a view to an arrest, examination and commitment, but with a view to a judicial investigation, trial, and conviction, as a case within its admitted jurisdiction, when in form and substance the conviction follows and affirms the matter of the complaint, and regulates the judgment to be entered, we think it is required, as well by the rules of the common law, as by the express requisition of the Declaration of Rights, that such complaint shall be, in a reasonable degree, certain, both in substance and in form and that the complaint under consideration, not having these re-

quisites, is not sufficient to sustain the judgment rendered upon it; and the exception is allowed."

Now, your Honor, these general principles have come down to us from ancient times and were explicitly stated in the Articles of the Declaration of [6] Rights.

In this Court more than 100 years ago, in the Supreme Judicial Court of Massachusetts a case came up which is almost foursquare with this case, Commonwealth vs. Crotty, in which a John Doe indictment—

The Court: What?

Mr. Twohig: Crotty.

The Court: What is the citation?

Mr. Twohig: 10 Allen, 403.

The Court: All right. Thank you.

Mr. Twohig: On page 404.

In discussing this case, your Honor, I'd like to call your attention to the fact that the words which are in the indictment in this case are the same words that were on the warrant which was issued on the indictment and which was outstanding when Mr. Connor was arrested, by accident. And, in the apartment of a person that the police had come to search, not looking for Mr. Connor. And, where they did not expect to find him. And, after a failure to search for Mr. Connor from May 1 up to August 6th; or to go to his home or to look for him in any way.

I think your Honor has probably read my motion for particulars and seen my allegations of those facts.

[7] Now, in this case of Commonwealth vs. Crotty, a warrant was issued for the arrest of a man named Crotty. And when the warrant was being served, Crotty said that it didn't apply to him. And his friends agreed with him. And they resisted the service of the warrant and the arrest of Mr. Crotty, and they were all brought to trial and convicted of riot, including Crotty. And the

Court said in regard to the warrant that it was an unlawful warrant. And here is what the Court said in discussing it. "We cannot entertain a doubt that the warrant on which the officer attempted to arrest one of the defendants at the time of the alleged riot was insufficient, illegal and void. It did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant, upon which any other individual might as well have been arrested, as being included in the description, as the defendant himself. Such a warrant was contrary to elementary principles, and in direct violation of the Constitutional right of the citizen, as set forth in the Declaration of Rights, which declares that every subject has a right to be secure from all unreasonable searches and seizures of his person, and that all warrants, therefore, are [8] contrary to this right, if the order in the warrant to a civil officer to arrest one or more suspected persons or to seize their property be not accompanied with a special designation of the persons or objects of search, arrest or seizure. This is in fact only a declaration of an ancient common law right. It was always necessary to express the name or give some description of a party to be arrested on a warrant; and if one was granted with the name in blank, and without other designation of the person to be arrested, it was void.

It must be sufficient," said the Justice in commenting on the warrant, "to indicate clearly on whom it is to be served by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified.

The warrant being defective and void on its face, the officer had no right to arrest the person on whom he at-

tempted to serve it. He acted without warrant and was a trespasser."

Now, your Honor, in the case of Connor, the warrant that was outstanding against him was on its face void. If that warrant were lawful, your Honor, process could be issued of the same kind on any charge [9] against any person in this Courtroom and he could be arrested without cause or without reason except the vague suspicions of some person who might swear out a complaint or who might bring out an indictment against him in some manner. Even if no indictment were brought out against him, if a John Doe indictment were brought out against some person without a description, anybody having the authority to do so, and being of a mind to act on mere suspicion or with vague ideas, might go out and arrest anybody against whom he had any particular bias. Your Honor, that kind of legal process was long, long ago denounced and repudiated by American Law.

In this particular case Connor has never been indicted. There is no description of any kind in the indictment; none on the warrant. When he was arrested he was questioned for some time, and he was arrested, they put handcuffs on him finally in the apartment where he was found where the police went looking for somebody else. He was not the only one who was arrested, your Honor. There was another man of the same size arrested with him; same height; same weight; same general appearance.

Now, the officers in arresting these two men, after a long conversation in which they showed some uncertainty, might have been acting on suspicion [10] or they might have been acting on information. But if they have acted on information it is their obligation to show if they acted with probable cause and they have to show that to a Grand Jury, your Honor. It is not possible where a man has not been indicted by a Grand Jury for an officer to arrest a man

on a void warrant and on information without probable cause. That is if he has no reason to believe that his informant is reliable or other facts and circumstances on which he can reasonably justify such a belief. And he certainly cannot come into Court after making an arrest, whether he is a member of the Boston Police Department or any other organization, and obtain an indictment by motion. And that is what was done in this case, your Honor.

Now, your Honor, I submit that the process that was applied to Connor in this case is unconstitutional, unjust, unlawful and dangerous. That it should be repudiated by this Court. And that Connor should be set free until and unless the Commonwealth has probable cause to arrest him and sufficient evidence at least to present to a Grand Jury for the return of an indictment. And I, therefore, leave that motion and the accompanying motion to dismiss in your hands.

My second motion is the motion for particulars, your Honor, and I think the main question will arise on [11] that motion on the matter of the secrecy with which Grand Jury proceedings are ordinarily clothed. Originally, your Honor, and it seems to me that this appears from the statutes themselves, that the mantle of secrecy was thrown around the Grand Jury for the purpose of protecting the Grand Jurors themselves and the prosecuting officers who went before the Grand Jury, and rightly so.

I don't think that the matter of protecting the witnesses was considered as such a serious or important matter. I think the fact that today a list of the witnesses is required to be given to the Clerk and recorded by him, after a Grand Jury presentment, is evidence of that, your Honor. But there is no doubt that the Grand Jury should be protected in its counsel.

If I can find my quotation here I'll give you the case,

your Honor. It is the Commonwealth against Hill, 11 Cushing, 137 and Commonwealth against Mead, 12 Gray, 167.

In the Commonwealth against Mead, your Honor, it was said by Justice Bigelow that there were three reasons for the sanction of secrecy.

One was to secure and utmost secrecy of disclosure of alleged crimes and offenses by prosecutors may be secured. [12] Two, that perjury and subornation of perjury may be prevented. That is during the Grand Jury hearing, your Honor. And there have been cases, your Honor, I submit to you, that there have been many cases where the defendants have attempted to communicate with the Grand Jury and to present their side of the case while the Grand Jury was in session. And they have presented fairly strong arguments for so doing, but nevertheless their theories have been rejected by our Supreme Court on the grounds that the jurors themselves and the prosecutors should be protected while they are in session, your Honor.

Thirdly, to conceal the fact that an indictment has been made until presentment and arrest.

Then the justice said, "But when these purposes are accomplished, the necessity and expediency of rataining the seal of secrecy are at an end. No harm can arise to the cause of the public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the Grand Jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defense, by enforcing a rule of exclusion, having its origin and [13] foundation in public policy, after the reasons on which this rule is based have ceased to exist. We think the exclusion of such evidence" — by a Grand Juror — "is not sanctioned by any rule of law or sound principle of public policy."

In that case, your Honor, Commonwealth against Mead, a Grand Juror was called to testify in order to impeach a witness who had testified before the Grand Jury and then testified before the Traverse Jury. And the Court, of course, upheld the right of the defendant to call the Grand Juror to testify. In that case you see, your Honor, the veil of secrecy was lifted, but at the same time there was no atempt to question the Grand Juror on the deliberation of the Jury which are always held sacred, or on the advice of the prosecutors which are likewise held above inquiry. And those are the things which were originally sought to be protected by the statute.

In Commonwealth against Hill the Judge said, "The extent of the limitation upon the testimony of Grand Jurors is best defined by the terms of their oath of office, by which 'the Commonwealth's counsel, their fellows, and their own, they are to keep secret.'"

There are many, many cases on this, your Honor, and there are two new ones in which the Federal [14] principle, which has been laid down in so many cases that where there is a particular need, where there is a compelling necessity to avoid injustice, that the secrecy of the Grand Jury will not be observed after an indictment and that matters of testimony before the Grand Jury by witnesses may be revealed. How else could it be found, your Honor, that, for example, more than one witness was in the room at the same time which is in itself a violation of the secrecy of the Grand Jury proceedings? Or other situations he disclosed which have been revealed in the cases of the Supreme Court and of the United States Court and the various Federal Court? I have enumerable cases on this principle, your Honor, and it seems to me that there is no doubt where there is a necessity to avoid an injustice, a deep necessity, a particular need to show certain facts in order to guarantee a defendant his constitutional rights,

that the veil of secrecy must be lifted and that the Court has discretion to lift it.

In appeal to your Honor to exercise his discretion in order to grant Connor his constitutional, his statutory and his common law rights in this matter.

I will pass on now to the next motion —

The Court: Well, let me interrupt you.

Mr. Twohig: Yes, your Honor.

[15] The Court: You take the position that, notwithstanding what you called to my attention, that this motion for particulars should be allowed?

Mr. Twohig: Yes, your Honor.

The Court: And in this form?

Mr. Twohig: Yes, your Honor.

The Court: These are only interrogatories, aren't they?

Mr. Twohig: No, your Honor, they are inquiries into certain facts relating to the deliberation of the Grand Jury. They do not relate to the Commonwealth's counsel. They do not relate to the counsel of the jurors. They do not relate to any votes cast by the jurors. They relate only to certain facts. One of them is the number of session of the Grand Jury.

The Court: What difference does that make?

Mr. Twohig: It will show, your Honor, that in spite of the number of sessions of the Grand Jury at which witnesses were entertained and heard that Connor's name was never brought out by the Grand Jury on an indictment, nor any description of Connor. And that, your Honor, I think establishes an irrefutable conclusion that they had no knowledge of Connor's connection in this case in any way either as a known or an unknown person.

[16] All the Grand Jury knew from these various sessions about this alleged crime was the name of the co-defendant and whatever else they may have known about

him, and I am not inquiring about that, and the fact that there was a second man present at the time of the alleged crime. Now, that is all they knew. And that is not sufficient knowledge on which to indict anybody, your Honor. Where no particular person is suspected, no warrant can be issued and no indictment can be made except a John Doe indictment on which a warrant cannot be served until there is information leading to probable cause.

The Court: Where, where does that information —

Mr. Twohig: In the arrest.

The Court: What?

Mr. Twohig: In the arrest and then he has to be brought into the Grand Jury.

The Court: In the possession of the person who makes the arrest, not in the warrant.

Mr. Twohig: If he's acting not on the warrant then it has to be in his possession and there has been no showing of anything establishing probable cause, and the burden, according to the Federal cases is on the prosecution to establish that knowledge.

[17] The Court: All right.

Mr. Twohig: And that is alleged in my motion.

However, in this particular case, Connor has never been indicted, but that was in relation to my first motion that I argued that point.

Now, going on to the motion for names of witnesses. It seems clear from the statutory and case law that we are entitled to the names of the witnesses before the Grand Jury. Chapter 277, Section 9, establishes the obligation on the Grand Jury to file a list of the witnesses with the Clerk of Court, and I suppose there is a reason for that. And I submit that the reason is the reason which is enforced in the cases, Commonwealth against Knapp, 9 Pickering, 495; Commonwealth against Locke, 14 Pickering, 485; Commonwealth against Walton, 17 Pickering,

403; Commonwealth against Edwards, 4 Gray. All those cases are old cases and they solidly establish the fact that the defendant was entitled to a list of the witnesses before the Grand Jury, and none of these decisions has ever been overruled.

With your Honor's indulgence I'll read a few paragraphs from the case. In Commonwealth against Knapp it was said, "Counsel for the defendant stated it to be the English practice, to endorse on the indictment [18] the names of the witnesses examined.

If an indictment is found upon improper evidence, it ought to be known." And that is another statement bearing on the secrecy of proceedings.

"A list of witnesses has never been refused in a case of this kind.

We are of opinion that the list shall be furnished to the counsel for the prisoner."

The Court: That was a capital case?

Mr. Twohig: Yes. And this is a capital case which we are dealing with today, your Honor.

Commonwealth against Locke, "On the general principles of justice and sound policy, the prisoner was entitled to know what persons had been examined as witnesses before the Grand Jury."

Commonwealth v. Walton, the Court said, "The prisoner was entitled to a list of the witnesses examined before the Grand Jury, but the practice had not gone beyond that." That was in a case, your Honor, where they wanted a list of all the witnesses.

Now, in the Federal cases today the prosecution is required to give a list of all the witnesses at least 10 days before the trial in order that the defendants may prepare itself adequately to meet the charge and the evidence.

[19] In this Court, in our Court in Massachusetts we have not so far as I know gone that far. But I do expect

In that case, your Honor, Commonwealth against Mead, a Grand Juror was called to testify in order to impeach a witness who had testified before the Grand Jury and then testified before the Traverse Jury. And the Court, of course, upheld the right of the defendant to call the Grand Juror to testify. In that case you see, your Honor, the veil of secrecy was lifted, but at the same time there was no atempt to question the Grand Juror on the deliberation of the Jury which are always held sacred, or on the advice of the prosecutors which are likewise held above inquiry. And those are the things which were originally sought to be protected by the statute.

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that the veil of secrecy must be lifted and that the Court has discretion to lift it.

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[16] All the Grand Jury knew from these various sessions about this alleged crime was the name of the co-defendant and whatever else they may have known about

a decision at any time that will enforce that right. However, there is no doubt, as was said in Commonwealth against Edwards, "In capitol cases, a list of the witnesses sworn before the Grand Jury in the particular case, is, under our practice, always furnished the prisoner."

So I submit, your Honor, that that motion should be allowed. And that is all I have to say this morning on these motions.

The Court: Mr. Reiser.

Mr. Reiser: Your Honor please, drawing myself to the first motions to quash and to dismiss, in 1899 the Legislature passed, which is now General Laws, Chapter 277, Section 19, "If the name of an accused person is unknown to the Grand Jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings with a reference to the fact that he was [20] indicted by the name or description mentioned in the indictment."

Now, in the case of Commonwealth v. Gedzium, 259 Mass. 453, this very problem was presented the Court and it was resolved and it was held that you could — it was a John Doe indictment. His name was later substituted and entered upon the record as the true name and the Massachusetts Supreme Court held that this was valid and the indictment should be sustained.

And in the notes in the green book, the Massachusetts General Laws Annotated, "Indictment for murder, describing defendant by fictitious name only was sufficient, under statute." Because of the statute it becomes sufficient and the statute was upheld in this particular case. The

Court permitted defendant's real name to be entered on the report describing defendant only by fictitious name.

Now, in this particular case the name of the defendant was unknown to the Grand Jury at that particular time. Certain evidence was presented to the Grand Jury partaining to the murder; witnesses testified before the Grand Jury. One of the defendants was indicted by name and the John Doe warrant was issued. Later on this man was arrested.

My Brother has introduced no evidence there [21] was not probable cause for the arrest. He's already rested, there's been no evidence whatsoever, and the burden of proof on a motion to dismiss as to evidence is upon the person presenting the motion. So, therefore, the motion to dismiss and the motion to quash in the Commonwealth's opinion should not be sustained.

Now, addressing myself to the motion for particulars. I'd like to state, as the background of this case, there was a hearing previously for a motion to obtain the minutes of the Grand Jury which was disallowed without prejudice by Chief Justice Tauro. And at that time I said in substance that from the very beginning this case has been a case of naked terror. The witnesses have been terrorized. They have been told, and one witness in particular, that —

Mr. Twohig: Your Honor —

Mr. Reiser: That defendants were going to get ahold —

Mr. Twohig: I object.

The Court: Well, I'll listen. I didn't interfere with your recitation factually or otherwise, and I'll listen to the whole matter in argument.

Mr. Reiser: They were going to get a hold of the Grand Jury notes and that the witness would get [22] the same thing as the victim.

That we have had through this entire case a terrorization of the witnesses; the witnesses are terrorized. They

are now being protected by the Commonwealth and one witness almost on a 24 hour basis.

There are other witnesses that are hiding pending this case because of the fear for their very lives.

Through the whole case the police have had difficulty obtaining the cooperation of the witnesses because of their terror. They were afraid for their lives literally. I know, because I have talked with these witnesses. And these motions for particulars are not particulars, they are interrogatories basically. My Brother wants to know the manner and means of how the crime was committed? The time, approximate time? The place, I'll be glad to give him that. But I can't go into all these details. What he wants to know basically is what happened in the Grand Jury. If your Honor wants me to, I'll go over each individual one; there are 31 of them.

The Court: 32.

Mr. Reiser: 32.

The Court: I thought they looked like interrogatories.

[23] Mr. Reiser: They are basically.

The Court: Beyond the scope of what ordinarily we consider are proper request for specifics or particulars which are only allowed to furnish the defendant and the Court reasonable knowledge of the nature and grounds of the crime charged.

Now, all these collateral matters don't seem to be in issue. They might well be in matters during a trial. I see here, "By what means," number 24.

Mr. Reiser: Perfectly agreeable.

The Court: That probably is a proper matter for particulars; 24.

I am not ruling on these now. I am merely thinking out loud.

Number 25 asks for the size and the number and all that sort of thing. I don't suppose the Commonwealth is obliged

to give that on a matter of particulars on an indictment. It might be important in the matter of a trial of identification, or having it marked as an Exhibit. But there may be something in that, on reflection, that some kind of an order might be made. Place? Number 13. Some part of that appears to be within reason. And number 32, I don't say none of the others are relevant, but those are the ones at first brush that appear to me that the [24] Commonwealth might well be ordered to particularize.

Mr. Reiser: I have no objections to those, your Honor. I mean, in the form, I may have objections, but to go into detail, what room it was, that is too much. The place, I'll tell him the place.

The Court: Well, I could draft an appropriate order.

Mr. Reiser: I would gladly give it to him without a Court order, those particular things.

Now, as far as the names of the witnesses before the Grand Jury —

The Court: How are you going to get away from the Edwards' case on that?

Mr. Reiser: I agree there except one thing. Some of these witnesses, if the Court orders and the Court feels that they should be supplied, I'd like the Court to take into consideration the danger that is inherent to a couple of these witnesses. Especially as to obtaining the addresses.

Now, if my Brother filed a motion to interview the witnesses we would supply them at a particular place, but to give him an address, that's another story.

The Court: A list of witnesses. It doesn't say anything about addresses, does it, in the statute?

[25] Mr. Reiser: The statute says; return to the Court.

The Court: Well, if I made any order I certainly would order the names impounded, if I made them available to the defendant; the names only. I haven't read the Edwards' case lately, but my recollection of it is that it's pretty

directive as far as the trial court is concerned. I don't want to fly in the face of absolute directives. I have enough difficulty handling the regular work and making decisions on those things that haven't been specifically decided and set out.

Mr. Reiser: The thing that I am more concerned about is the addresses and the whereabouts of these people. I'll state that if his Honor should, at any later time, make an order that the defendants be allowed to examine them, pre-trial, if there is an order which I would object to, but if there is one we would make them available in the Courthouse.

The Court: Anything else?

Mr. Reiser: Nothing, your Honor.

The Court: Mr. Twohig?

Mr. Twohig: Your Honor, the defendant simply wants his rights. He doesn't want any special arrangements or benefits from the prosecutor's office. He doesn't want them to go to any undue trouble [26] whatsoever on his behalf. He simply wants his rights in this case.

The Court: There are limits to what rights he's entitled to have.

Mr. Twohig: There certainly are, your Honor. But the outside limits or his rights in this case would be his immediate release because of an unlawful arrest and no indictment in this case.

The Court: How do you get away from Section 19, Chapter 277?

Mr. Twohig: Your Honor, it has no relation to this case.

The Court: Why not?

Mr. Twohig: It says a fictitious name.

The Court: Or a John Doe.

Mr. Twohig: John Doe is not a fictitious name, your

Honor. A fictitious name is a nickname or a false name which has been assumed by a defendant.

The Court: How do you get away from the Gedzium case?

Mr. Twohig: There was a description of the defendant. The Gedzium case is not interpreted as —

The Court: There is a description in the indictment? No? Well, you better believe again. There couldn't be a description in the indictment. The [27] Gedzium case, the indictment was fashioned exactly as this one was.

Mr. Twohig: I don't believe it was, your Honor, I may be mistaken.

The Court: I remember the Gedzium case very well because I was quite active in the practice of law at the time.

Mr. Twohig: Yes, your Honor.

Well, your Honor, I don't think that the Gedzium case has any application, and I don't think Section 19 has any application. There has never been a decision in which it has been stated that an indictment or a warrant without a description and based on a John Doe application was good.

The Court: Now, you are saying an indictment or warrant.

Mr. Twohig: And.

The Court: Well, the indictment is one thing, Mr. Twohig. His arrest is something else again, isn't that so?

Mr. Twohig: I claim that he has not been indicted and that it was an invalid arrest. And there has been nothing to make it valid since then. There has been no subsequent indictment. There has been no showing of probable cause either on the arrest or [28] the indictment.

The Court: That is your burden to show on a motion to quash or to dismiss that he was illegally arrested.

Mr. Twohig: I believe that the cases, I have a decision

here somewhere which states that the burden is on the prosecution, your Honor.

The Court: To what?

Mr. Twohig: To establish probable cause in an arrest. I'm pretty sure I have a decision on that.

The Court: Well, that isn't the recent statements and decisions of this Court, the highest Court in this Commonwealth and of any outside that I am aware of, but I could be in error. There's very explicit language in some case that says that it is the defendant's burden to prove.

Mr. Reiser: Commonwealth v. Roy.

Mr. Twohig: Well, I have a decision here somewhere, your Honor, but I can't find it on short notice. If I do find it I'll submit it to your Honor.

The Court: You may, yes, certainly.

Mr. Twohig: Now, before I terminate, your Honor, I would like to make the comment on this ridiculous argument about terror in this case. This is the most unfair and unjust argument that could be[29] leveled. It is without any foundation whatsoever that we know of. There hasn't been one single fact referred to even in argument to show that there has been any terror or fear instilled in anybody in this case. Here was an alleged murder that happened on May 1, 1965. Connor was at large at that time. From May 1, 1965 he lived at home in South Boston until his arrest, I think it was on August 6th. He never left the State. Went about his ordinary everyday life. Went on a couple of vacations to the Country. Came back, went with his brothers, came back. Every day out on the street associating with his friends. Seen by everybody including the police. His home is well-known. There's no secret about where he resides. The police never visited his home in all that time. There is no evidence during all that time, there is no indication whatsoever that there was any terror or fear or violence or threatened violence in this case against any

person. No person's name has been mentioned as having been threatened or instilled with fear.

The Court: Well, Mr. Reiser didn't say this man or anyone associated with him was threatening anyone.

Mr. Twohig: He didn't say anybody was threatening anyone. He didn't give us the name, if he [30] did, I didn't hear him say that any man, woman or child threatened anyone. He says there is an atmosphere of fear and terror. Fear instilled into the witnesses by whom? An animal? A human being? A man? A woman? A child? one of the defendants? An anonymous telephone call, if so, to whom? To whom? To the police? To Mr. Reiser? We don't know if he's acting on hearsay once, twice or three times. I never heard such a vague, ridiculous argument in my life in a Courtroom. We don't know who received the calls. We don't know who made the calls. Even if there were calls. We don't know. Who gave him this information about terror? Where does it come from? Perhaps it's just imaginary on his part, we don't know. We've had no facts.

Now, that sort of vague, nebulous argument about imaginary things is not sufficient, your Honor, on which either to deny or to admit any motion or any application of the testimony. The defendant should have opportunity to get the evidence which will help him to defeat this action. Who can be more helpless in a criminal case than the man that doesn't know anything about it? Than the man who was never there? The man who was picked up on suspicion?

The Court: Just a minute, the Commonwealth has the burden of proving it, doesn't it, beyond a [31] reasonable doubt, every particular? He doesn't have to prove anything. He can stay as quietly and as calmly as he appears to be at this moment and doesn't have to raise his finger or wink his eye or do anything. The Commonwealth must prove that he did that which they claim he did.

Mr. Twohig: Yes, but in the meantime they can bring him to trial. They can put him on trial for an infamous

crime, a disgraceful crime, in violation of his rights.

The Court: You don't claim that the Commonwealth and the District Attorney's office here is cutting something out of whole cloth and proceeding on charges that have no foundation in fact?

Mr. Twohig: I certainly do, Your Honor. I certainly do claim that. And I claim that I have had nothing, and the Court has had nothing to do on this point to claim otherwise.

The Court: Now, just a minute. The Court has something to indicate otherwise. A properly drawn indictment —

Mr. Twohig: A nullity.

The Court: That is a question of law, isn't it? An indictment signed by the Foreman of the Grand Jury. The Court has something.

[32] Mr. Twohig: I certainly feel that that Grand Jury was mislead, your Honor, in issuing that indictment.

The Court: Well, that is a matter of opinion I suppose. I am not being threatened, and I am not afraid.

Mr. Twohig: No, I know you are not, your Honor.

The Court: Of this or anything else. Except that my God watches me, that is the only thing I am afraid of.

So I will take the papers and give consideration to these several matters that have been presented to me in these cass and will make an appropriate order and counsel will be advised.

Mr. Twohig: Thank you, your Honor.

Mr. Reiser: Thank you.

Mr. Twohig: Your Honor, before you terminate the session, I have other matters I'd like to bring to your attention, preliminary matters I'd like to bring to the attention of the Court. May I have an extension of the time within which I can file dilatory proceedings? There is another defendant in this case and I understand he's just procured counsel.

The Court: You were given —

[33] Mr. Twohig: 30 days, your Honor, which expired Monday, and I'd like to file some others, could I have an extension of time?

The Court: I'm sure that any Court will accept any extension. But what do you specifically request?

Mr. Twohig: Well, only the time to expire on the same date as the co-defendant's time in the case.

Mr. Reiser: Co-defendant has not been arraigned yet.

The Court: So he hasn't asked for one?

Mr. Reiser: Somebody said he was arraigned yesterday.

The Court: Yes, he was as a matter of fact.

Mr. Reiser: I wasn't informed.

The Court: He was arraigned on September 13 before Mr. Justice Hudson. Mr. Balirro was appointed counsel subject to his filing an affidavit as required by rule 95, but there was no other order with respect to the time. Of course, under our rule now he has 10 days and any other additional time that the Court may grant.

Mr. Twohig: Well, undoubtedly when he files [34] his application for appointment and that is allowed he will be given a period of time.

The Court: He would have 10 days, but I don't think, Mr. Twohig, that it's necessary to extend the time to allow you to file further pleadings.

Mr. Twohig: Well then I will simply file them and let the Court deal with them.

The Court: I should think the Court would hear them. I'm sure this Court is not interested in stifling the presentment of proper motions, and I don't think the District Attorney's office would raise any serious objections to it.

Mr. Twohig: Not serious objections.

The Court: Okay. Recess.

(Hearing adjourned)

SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. S-13, 706

COMMONWEALTH OF MASSACHUSETTS

v.

WILLIAM R. DOHERTY (AND FOUR COMPANION CASES[1])

Before: Wilkins C.J., Whittemore, Cutter, Kirk and Spiegal J.J.

OPINION

August 22, 1967

WHITTEMORE, J. Donald E. Landry (Emo Landry) and James J. Connor (indicted as John Doe) were found guilty of murder in the first degree of Robert W. Davis. There was evidence to show that the crime was committed shortly before 3 A.M. on May 1, 1965. The jury recommended that the death penalty not be imposed. William R. Doherty and his wife, Janice M. Doherty, were found guilty of being accessories before the fact to murder in the first degree with recommendation that the death penalty not be imposed. Both Dohertys were also found guilty of being accessories after the fact to murder.

The trials were held subject to G.L. c. 278, §§ 33A to 33G inclusive. Most of the testimony regarding the events preceding and following the homicide was given by Elizabeth Moore. She had lived and boarded with the Dohertys and their four year old child for two years in the third or top floor apartment at 116 Dakota Street in the Dorchester district of Boston. Most of the testimony as to the actual killing came from Ronald Hayes, who had been a friend of Moore for several years and who was her companion on the night of the homicide.

Moore testified that on Friday evening, April 30, 1965, she and Hayes, in the company of the Dohertys, drank beer

[1] The cases are described in the text of the opinion.

at the Sportsman's Cafe in Dorchester. Later, she, Hayes, the Dohertys, Davis (the deceased), and his friend Ronald Edwards gathered at the Doherty apartment. The company of six had supper in the kitchen. Beer was served. Doherty and Davis left the kitchen and went into the den. Upon their reappearance, Hayes saw that Davis had a gun in his belt. Edwards then left on Davis' cryptic instruction to "Go get the queen," and "Go pick up the payroll" (according to Mrs. Doherty's testimony, "payload" or "payroll").

Hayes and Moore went to the latter's room, and while there heard noise and commotion. Moore opened the door and saw Mrs. Doherty making a telephone call. Davis and Doherty had returned to the den. On his wife's summons, Doherty again came out of the den and continued the telephone conversation which was not overheard. Doherty returned to the den. Mrs. Doherty then took the telephone to Moore's room, made a call, asked for "Emo," and, while waiting, told Hayes and Moore that Davis had two guns at Doherty's head and that she had to get someone to help him. She repeated this statement on the telephone. Doherty then entered the room again and said to his wife, "Janice, tell her this guy is Bobby Davis who's against me, if something happens before they get up, and tell him to bring his piece and to get up here." Mrs. Doherty said, "[B]ring your piece." Upon completion of the call the Dohertys left the room.

Approximately five minutes later Mrs. Doherty returned, made another telephone call and said, "Hello, Emo, what's taking you so long? Why aren't you up here? He's going to kill Billy [Doherty]. Will you please come up? Take a cab, Emo. We're at 116 Dakota Street." Mrs. Doherty asked Moore for the cab money and told Moore and Hayes that they had better leave. "There's going to be trouble. . . . Emo is coming up, and he has a big gun. . . . [H]e

knows how to use it.... [I]f you want to leave, go ahead. Get out of here." Moore and Hayes declined to leave.

Moore went downstairs to meet the cab. While there she saw Edwards returning in Edward's car with another man, Adrian Delaney. Edwards drove away. Delaney remained on the porch with Moore, who then saw a cab come up Dakota Street and stop at a side street. Two people got out of the cab and went into some nearby bushes. One of them was carrying a "violin case." The jury, from later testimony, could have inferred that these two were Landry and Connor.

Delaney pointed a gun at Moore, calling her "Mrs. Doherty." Doherty appeared on the porch from upstairs with a gun "in his waist." Doherty told Moore to "get out of there." A fight between Doherty and Delaney followed. Moore ran off the porch along the side of the house to the garage. While there, she heard a shot. Delaney ran past her down Iowa Street. She heard another shot from upstairs. Then she saw "Jimmy Connor" carrying a long case. Moore had previously met Connor through Mrs. Doherty's parents, the Bakers, who lived in the same house as the Dohertys on the second floor. Moore asked Connor what she should do. He answered, "Just stay there and be quiet." Moore saw Hayes run from the house, get in his car and leave. On her return to the house from the garage, Moore saw Davis lying on the front porch.

Hayes' testimony of events in the Doherty apartment from the time of his arrival to the time Moore went downstairs to meet the cab was, in most particulars, corroborative of Moore's testimony. While Mrs. Doherty was making the telephone call to Emo, Doherty told his wife to "Tell Emo [that] Davis did it if I am killed." In response to a question by Moore, Doherty said that Davis was asleep on the couch in the den and that he did not try to take the

guns away from Davis because he was afraid he would get shot if he woke Davis.

After Moore had gone downstairs, Hayes saw Doherty take the two guns away from Davis, who was sleeping. Both guns were Lugers. Doherty kept one. He gave the other to Hayes and told him to protect his (Doherty's) family. Doherty went downstairs. From the front porch on the third floor Hayes saw two men get out of a cab, one carrying a gun case. About the same time, a car stopped in front of the house and Hayes heard a gunshot on the porch. "Connors" came upstairs, grabbed Hayes by the throat, and pushed him against the wall. Hayes saw no weapon on Connor. Hayes told him, "I'm on your side. . . . I'm with you. I know nobody." Mrs. Doherty came into the room and said, "Not him; the one on the couch." Hayes heard someone coming up the stairs and also heard "bolt action or shotgun action or something like that." Landry came in and pointed a "rifle" at Hayes. Mrs. Doherty said, "Not him; the one on the couch." Landry "put the gun in Davis' belly," said "hey, hey" twice, and "shot him in the belly." Mrs. Doherty came running into the room and said, "Get him out of here." Landry and Connor picked Davis up, "one under each arm," dragged him to the doorway and "let him go." Shortly afterwards, Hayes left the premises. He observed blood spattered on the front stairs and passed Davis who was "sprawled out on the front porch." Hayes got into his car, drove around the corner, dropped the Luger into a sewer and went home.

Moore testified that after the shooting Doherty, his wife, Moore, and Mrs. Baker met in the Baker apartment where it was decided by all, including Moore, that they would tell the police "that two guys came up here and broke in and shot him." Moore said to Doherty, "I'll be a witness for you, Billy. I know you didn't shoot him." Doherty called the police. When the police arrived about 3 A.M. on Satur-

day, May 1, Doherty was on the porch, standing beside Davis' body. Doherty told the police that he had been in a fight, had run from the porch and found Davis' body when he returned. Subsequently, the medical examiner reported that Davis died of a shotgun wound in the chest.

1. We discuss first the assignments of error relating to the denial of the Dohertys' motions, filed at the close of the evidence, for directed verdicts of not guilty.

The evidence was insufficient to warrant a verdict of guilty against Doherty on the charge of being an accessory before the fact to murder. The Commonwealth's evidence showed that Davis had imperiled Doherty's life. The only words used by Doherty to his wife while she was telephoning were, "tell her this guy is Bobby Davis who's against me, if something happens before they get up, and tell him to bring his piece and to get up here," and "Tell Emo [that] Davis did it if I am killed." Doherty's words were, at most, a call for armed help to be used if needed. Before any help arrived, Doherty disarmed Davis who was asleep. Thus, the situation for Doherty had changed from one of imminent peril to one of defensive security in his own dwelling as indicated by his giving one of Davis' Lugers to Hayes with the words, "Protect my family." Doherty had then gone downstairs to the front porch where he encountered Delaney pointing a gun at Moore, who was awaiting the arrival of the armed help. Moore testified that Doherty's ensuing fight with Delaney was to protect her from bodily harm, and that she had written to Doherty while he was in jail that he had saved her life. The testimony shows that Doherty had left the scene after a shot was fired during the fight with Delaney. It is speculative what Doherty would have done had he remained on the porch or on the scene until Landry and his companion arrived. The Commonwealth failed to establish beyond a reasonable doubt that Doherty counseled or procured the murder of Davis. G.L.

c. 274, § 2. A verdict of not guilty should have been directed for Doherty on the indictment charging him with being an accessory before the fact to murder. *Commonwealth* v. *O'Brien,* 305 Mass. 393, 401. *Commonwealth* v. *Carter,* 306 Mass. 141, 147. *Commonwealth* v. *Fancy,* 349 Mass. 196, 201.

On the other hand, there was no error in the denial of Mrs. Doherty's motion for a directed verdict on the indictment charging her with being an accessory before the fact to murder. The evidence most favorable to the Commonwealth shows that she placed the calls for armed assistance, was present in the apartment when the armed help arrived, and saw Landry pointing a gun directly at Hayes. The jury could find from this evidence, and from her prior statements to Moore, that she was fully aware of Landry's intentions. She made no effort to explain to Landry or his companion that circumstances had changed since she had placed the telephone calls for armed assistance. Rather, she pointed out Davis to Landry, who then killed Davis. The evidence warranted a finding that she was guilty as an accessory before the fact to murder.

There was likewise no error in the denial of the Dohertys' motions for directed verdicts on the charge of being accessories after the fact to murder. Mrs. Doherty's brief does not expressly argue the point. The ground for Doherty's motion was that any acts of Doherty sufficient to constitute the offence were directed toward his wife, so that he had a defence under G.L. c. 274, § 4. The indictment charges that he "did harbor, conceal, maintain and assist" the principal felons. The fact that the same acts also assisted his wife, charged with being an accessory before the fact, does not preclude his conviction under the indictment.

2. We now turn to Connor's challenge to the validity of the indictment charging him with murder. As returned by the grand jury on August 4, 1965, the indictment for mur-

der ran against Landry "and John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown." On August 9 the Commonwealth filed a motion to amend the indictment by substituting the name of James J. Connor for John Doe. A hearing was held at which no evidence was introduced. The motion was allowed. On August 10, 1965, the docket entry of August 9 was "corrected so as to read as follows: Commonwealth files motion to amend indictment. Court . . . having determined that true name of John Doe has been discovered to be James J. Connor, orders the name James J. Connor to be entered on record as true name."

On September 10, 1965, Connor filed motions to quash and to dismiss the indictment. The grounds for the motions were, inter alia, that there is nothing in the indictment to indicate that John Doe was ever described to the grand jury in any manner, that Connor has never been indicted by the grand jury, and that there is nothing in the warrant based upon the indictment to indicate in any way that the "John Doe" intended to be arrested was Connor. After a hearing on September 24, the motions were denied and exceptions taken. There was no error.

General Laws c. 277, § 19, provides that "If the name of an accused person in unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment."

"The procedure [of entering the true name on the record] is somewhat analogous to specifications required by

G.L. c. 277, § 40, which must be furnished as matter of right and which must be read with the indictment for a full description of the crime charged." *Commonwealth* v. *Gedzium,* 259 Mass. 453, 457. The allowance of the motion "presupposes the finding by the court of all the facts essential thereto to the end that no injustice be done to any defendant" (*ibid,* p. 461). The judge could act on the district attorney's representations. By the presentation of the motion, these were that the man described in the testimony before the grand jury and designated as John Doe was Connor. While evidence was not required, a statement by the district attorney to make express the implications of the motion, or the presentation of testimony or of affidavits, would have been appropriate and desirable.

This was not an indictment in blank. In the context of the murder indictment and the other indictments the name "John Doe" identified the person associated with Landry and the Dohertys in the crime of May 1, 1965. The murder indictment was of "Donald E. Landry alias Emo Landry [and] John Doe." The inescapable inference is that the complicated facts of, and related to, the killing of Davis were placed before the grand jury. The "John Doe" of the indictment was the man who acted a particular and described part. Under the *Gedzium* case, it is no longer necessary that the indictment itself give "the best description possible of the person to be arrested." *Commonwealth* v. *Crotty,* 10 Allen, 404, 405. There was no violation of the "great principle asserted by the Declaration of Rights . . . that no man shall be put to answer a criminal charge until the criminating evidence against him has been laid before a grand jury and they have found probable cause" — quoted in the *Gedzium* case (p. 459) from *Commonwealth* v. *Holley,* 3 Gray, 458, 459-460. Connor became answerable to the indictment of August 4, 1965, when his name was entered on the record on August 9, 1965. On

August 10, 1965, a copy of the indictment was sent to the sheriff for service on Connor. This is a stronger case on its facts than the *Gedzium* case where all three defendants were indicted under fictitious names.

3. The defendants Landry and Mrs. Doherty have assigned errors based on their inability to interview the witness Moore in advance of trial, and three of the defendants have assigned and argued similar errors based on their inability to interview the witness Delaney. All the defendants have assigned as error the refusal of the trial judge to permit them to inspect the testimony given by Moore before the grand jury which was sitting in June, 1965, and before another grand jury sitting in August, 1965. We treat these assignments of error together.

Prior to trial, the witness Moore was held in protective custody by the prosecution. In response to a motion filed and allowed, Landry's counsel appeared at the court house at Boston on November 16, 1965, for the purpose of interviewing Moore. The prosecutor and an assistant and a stenographer were in atendance.

At the outset of the interview, Moore stated that she had knowledge of the facts and circumstances of the charge against Landry. Landry's counsel then asked the witness: Q. "And have you testified concerning those matters before the Grand Jury?" Before the witness could answer the question, the prosecutor interrupted. In the colloquy between counsel which followed, the prosecutor made clear his position that Landry's counsel had no right and would not be permitted to question the witness with respect to anything which took place before the grand jury. As a result of this colloquy, the attempted interview was concluded without further questioning.[2]

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[2] The interview ended with the following exchange between counsel. COUNSEL FOR LANDRY: "I feel you are exercising duress and collusion, as far as this witness is concerned." ASSISTANT DISTRICT AT-

On February 9, 1966, the witness Moore appeared in court in connection with Landry's motion to suppress her testimony. The judge addressed the witness as follows: "[W]ith reference to submitting to interview, the Court . . . does not order you to answer any questions put to you by them. Now, the decision is up to you. You may decide what you want to do." The witness answered that she did not "care to go into it at this time." Mrs. Doherty's motion to interview the witness was similarly dealt with. The judge denied both motions. Landry's counsel brought to the judge's attention a copy of the transcript of the attempted interview on November 16, 1965, which was annexed to his motion. He argued that the witness' state of mind was due to the interference and directions of the prosecutor which should be neutralized by the judge or by questions by defence counsel.

Later, during the same hearing, counsel for Landry presented a motion in writing for inspection of the grand jury minutes. The stated ground for the motion was, in part, his inability to obtain an interview with the witness Moore. The prosecutor argued that the motion should be denied "in the interest of safeguarding these witnesses." He stated that "[o]ne of the assurances that I gave the witnesses before they went in the grand jury is that proceedings of the grand jury would be secret, and that the only tme that they would have to worry about any testimony would be in the open courtroom during the course of the trial." The judge denied the motion as matter of discretion and counsel for Landry excepted.

The first opportunity defence counsel had to question Moore came one month later during their cross-examination

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TORNEY: "You can ask her any questions except what went on in the Grand Jury." COUNSEL: "You are no one to say what questions I can or cannot ask this witness. You have no right. You don't own this witness." ASSISTANT DISTRICT ATTORNEY: "Anything to do with the Grand Jury is secret."

of her at the trial in March, 1966. It then developed that Moore had given perjured testimony in her appearance before the June grand jury. Moore admitted under cross-examination that the testimony which she had given before the grand jury in June, 1965, was different from the testimony which she had given before the grand jury in August, 1965, and was different from the testimony she had given on direct examination to the trial jury. She admitted that she had given at least two different stories of the events which had taken place at 116 Dakota Street on May 1, 1965. She testified that she had "told the District Attorney's office" that when she was before the first grand jury she had "committed perjury."

Upon eliciting this testimony, defence counsel requested that they be given an opportunity to examine the testimony given by Moore before the two grand juries. The judge declined so to order. All the defendants duly excepted. The judge then ascertained that the prosecutor had one copy of the minutes of the first grand jury and no copy of the minutes of the second grand jury. He said to defence counsel: "[Y]ou can get . . . [this] in evidence . . . by getting the stenographer." He instructed the prosecutor to inform defence counsel who the stenographer was. To defence counsel he said, "[Y]ou can . . . have him available and the minutes only in relation to . . . this witness."

In respect of the attempted interviews with the witness Delaney, the judge told the witness that he himself was to decide whether he wished to discuss the case with counsel for the defendants. Delaney replied, "I don't wish to say anything."

There was no error in denying the defendants' motions for inspection of Moore's grand jury testimony. This court has held that granting permission to examine grand jury minutes rests in the discretion of the judge. *Commonwealth* v. *Balliro,* 349 Mass. 505, 518. See *Commonwealth*

v. *Giacomazza,* 311 Mass. 456, 462; *Commonwealth* v. *Galvin,* 323 Mass. 205, 211. Where it is alleged that an inconsistency exists between a witness' testimony at the trial and his testimony before the grand jury, it is appropriate for the trial judge to read the minutes to determine if there is an inconsistency, and, if it is found to exist, to permit defendant's counsel to examine the grand jury testimony. *Commonwealth* v. *Kiernan,* 348 Mass. 29, 36, cert. den. sub nom. *Gordon* v. *Massachusetts,* 380 U.S. 913. *Commonwealth* v. *Abbott Engr. Inc.* 351 Mass. 368, 578-579. We have indicated, citing *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400, that where a particularized need for an examination of the grand jury minutes is shown which outweighs the policy of secrecy, the defendant may be entitled to them. *Commonwealth* v. *Ladetto,* 349 Mass. 237, 244-245. See also *Commonwealth* v. *Giles, ante,* 1, 18-19.

A particularized need having been shown, defendants' counsel were entitled to inspect the grand jury minutes, so far as available and relevant, under the reasonable supervision of the trial judge. The minutes of the first grand jury were, it appears, available. The judge's ruling, however, did not deprive the defendants of access to any of the minutes and they were not prejudiced. Having failed to pursue the course indicated, the defendants may not prevail in their exceptions to the denial of the motions to inspect the minutes.

Nor do we discern reversible error in respect of the denial of the motions to interview Moore and Delaney. The decision whether to be interviewed lay with the witnesses. The judge appropriately could have informed them, additionally, that (1) each might have counsel, (2) the defendants were entitled to interview witnesses and should not be deprived of the opportunity by whim or caprice, (3) prior testimony of the witnesses before the grand jury and con-

versations with the district attorney were not reasons for declining to talk with defendants' counsel, and (4) each might give weight to the risk of self-incrimination or personal danger in deciding whether to talk. However, much must be left to the discretion of the judge, who saw and heard the witnesses. If a witness elected to be interviewed, we think the defendants' counsel were entitled to talk with the witness, each separately and without the presence of the prosecutor or police officers. See *Commonwealth* v. *Balliro*, 349 Mass. 505, 516-517.

The circumstances that require protective custody strongly suggest the risk of intimidation and other improper pressures. That no such pressures would be exerted or suggested by counsel would not relieve the witness of all concern. We think it very unlikely that remarks by the judge as requested, to neutralize what the prosecutor may have said, would have altered Moore's decision to keep still and avoid possible trouble. The judge must take reasonable steps to protect not only the witness but also the Commonwealth and the integrity of its case. He may in his discretion require that a stenographer be present at any interview with a witness in protective custody.

4. Counsel for Mrs. Doherty moved before trial that paragraphs 2 and 3 of the bill of particulars filed by the prosecution in response to motions by Mrs. Doherty[3] be struck, and excepted to the denial of the motion. Counsel for the principals Landry and Connor, who were tried jointly with Mrs. Doherty, correctly anticipating that the particulars filed in response to Mrs. Doherty's motions would be read with the indictments and would be usable against them, also moved to strike paragraphs 2 and 3 of

[3] The attorney who represented Mrs. Doherty when the motions for particulars were filed was not appointed by, and was not eligible for appointment by, the Superior Court under Rule 95 of the Superior Court (1954). The motion to strike was filed by Mrs. Doherty's court appointed counsel.

the bill of particulars and excepted to the denial of their motions. We discern no error in the denial of the motions. The specifications described "blood [that] spurted out of his chest like water from a faucet." In this and some other respects deletion would not have been inappropriate. But we are dealing with murder, apparently in cold blood, by a shotgun held to the victim's chest. The essential horror of the crime makes incidental whether blood spurted or did not spurt.

5. The defendants Landry and Connor assign as error the trial judge's denial of their motions for severance. One of the grounds advanced by Landry and Connor for severance is the prejudicial effect which the particulars filed in response to Mrs. Doherty's motions had upon their trials. That ground is disposed of by what we have said in respect of the bills of particulars.

The other ground advanced for severance by Landry and Connor, and by Mrs. Doherty in her motion for a mistrial, is the denial of their constitutional right to have other co-defendants testify on their behalf during trial. Each contends that if severance were granted, the other defendants would be available to testify during his or her trial. This does not necessarily follow, and is not sufficient reason for requiring a severance. *Gorin* v. *United States,* 313 F. 2d 645-646 (1st Cir.) cert. den. 379 U.S. 971. *United States* v. *Kahn,* 366 F. 2d 259, 263-264 (2d Cir.) cert. den. 385 U.S. 948. Whether severance should be granted was within the discretion of the judge. *Commonwealth* v. *Fancy,* 349 Mass. 196, 204-205. There was no error.

6. The defendants Landry and the Dohertys contend that the evidence was such that the judge erred in permitting a finding that the killing was with extreme atrocity or cruelty. General Laws c. 265, § 1, provides: "Murder committed with deliberately premediated malice aforethought, or with extreme atrocity or cruelty, . . . is murder in the

first degree." The law applicable to the issue was stated by the judge in unexceptionable language, following *Commonwealth* v. *Devlin,* 126 Mass. 253, 255.

The testimony of the murder and how it was done was given by Hayes. That testimony being accepted, as was necessary for a finding of guilt, established beyond doubt deliberately premeditated action. We think it unnecessary, therefore, to weigh precisely whether the jury could find that Davis was unconscious of all the callous cruelty of the murderers in arousing or attempting to arouse a sleeping or dozing victim, and then shooting him at close range, dragging him to the doorway and there "let[ting] him go," that is, as the jury could infer, dropping him down the stairs. Hayes testified that Davis "woke up for a second and then there wasn't a sound." The testimony did not fix the exact time of death. The medical examiner testified that death was the "result of a gunshot wound of chest with massive hemorrhage." The shot tore through the aorta. The jury could conclude that Davis had some awareness of what was being done to him. We discern no reversible error. See *Commonwealth* v. *Devereaux,* 256 Mass. 387, 394 (shooting, and two or three blows with a gun butt); *Commonwealth* v. *Knowlton,* 265 Mass. 382, 388 (beating and rape). In the *Knowlton* case, we held that the "degree of atrocity or cruelty . . . must be considered as aggravated and extreme. The nature of a question of this kind is such that it must largely be left to the determination of the jury. . . . [T]he evidence [however] must be sufficient to justify . . . submitting the case to the jury."

7. Moore testified on direct examination that she had never known Davis prior to the night he was killed. Counsel for Landry sought to introduce evidence that there was a holdup at the office where Moore was employed while Moore was out to lunch, that Moore asked her employer for permission to accompany him to the police station, that at

the police station her employer had picked out Davis as the holdup man and had shown his picture to Moore, and that Moore had expressed some interest in the picture. All of this took place three days before Davis was shot to death. The evidence was offered to attack Moore's credibility. The judge refused to admit the evidence. All the defendants excepted. Only the defendant Connor has argued the exception. While the defendants are entitled to reasonable latitude in developing inconsistencies in a witness' testimony, the extent to which collateral matters shall be explored is in the discretion of the judge. We think the evidence was admissible but we see no reversible error.

8. We see nothing in the contention that Doherty's talk with the police at his house when they came in response to his call was inadmissible. He was not under arrest. The police asked him what had happened.

9. The judgment against Doherty for being an accessory before the fact to murder is reversed and judgment is to enter for Doherty on the underlying indictment. The other judgments are affirmed.

So ordered.

Kirk, J. (dissenting) Mr. Justice Spiegel and I are unable to agree with the views expressed in the majority opinion which bear heavily upon the fundamental rights of an accused. We believe that (1) the prosecutor's interference with the defendants' attempted interview of Moore, and (2) the judge's withholding of Moore's grand jury testimony from the defendants require that the judgments in all the cases be reversed and the verdicts set aside. We further believe that (3) the "John Doe" indictment under which Connor was convicted must be quashed.

1. In *Commonwealth* v. *Balliro,* 349 Mass. 505, 516, this court, citing art. 12 of the Declaration of Rights of our Constitution, stated that "counsel for a defendant should be accorded, *as of right,* an opportunity to interview pro-

spective witnesses held in the custody of the Commonwealth. Witnesses belong neither to the Commonwealth nor to the defence" (emphasis supplied). "It is too plain to be labored that the interviewing of prospective witnesses is an essential part of the preparation of a case for trial." *Id.* at 517-518.

The defendants' attempt to interview Moore was made four months after our decision in the *Balliro* case. During the attempted interview the defence was not permitted to elicit from Moore an answer to any question which the prosecutor did not approve. We see no difference in principle between refusing to grant a defendant physical access to the witness (*Commonwealth* v. *Balliro*, 349 Mass. 505, 516) and refusing to permit defendants, as was done in the present case, to get answers to questions put to the witness. In either case, the right to interview the witness is unwarrantably controlled by the prosecution.

At the court hearing which followed the abortive interview, the prosecutor attempted to justify his actions by unsupported allegations that Moore was in constant danger of reprisals from the defendants. That this is not a sufficient reason for depriving a defendant of his right to interview a prospective witness was clearly stated in the *Balliro* case, where the risks to the witnesses were not merely alleged but were evidenced by past acts of the defendants: "That the witnesses, as the Commonwealth argues, were 'victims' of the acts of the defendants does not alter the defendants' rights." 349 Mass. at 518.

We believe, therefore, that where, as in the present cases, it appears that the prosecutor has interfered with the defendants' attempts to interview a witness in protective custody, the judge is under an affirmative duty to neutralize the effect of the prosecutor's interference by appropriate action. The judge could have done so by granting the defendants' pre-trial requests to examine Moore's grand jury

testimony. We are now, however, left to speculate what the posture of the defence would have been if the prosecution had not interfered with the defendants' efforts to interview the witness, or if the judge had taken appropriate action to counteract the prosecutor's interference. *Commonwealth* v. *Balliro,* 349 Mass. 505, 517. In our view, the defendants have been so prejudiced in the preparation and presentation of their defence as to require that new trials be granted.

2. The defendants were entitled to examine Moore's grand jury testimony. At the trial, Moore was the key witness for the prosecution. The fate of all the defendants hung on her testimony. The inconsistency between Moore's grand jury testimony and Moore's trial testimony was not merely alleged, but was proved in open court. Cf. *Commonwealth* v. *Abbott Engr. Inc.,* 351 Mass. 568, 578-579. Her public confession that she committed perjury before the grand jury does not establish the truth of her testimony before the trial jury. In these circumstances, the defendants' "particularized need" for inspecting Moore's grand jury testimony and their consequent right to do so is self-evident. *Commonwealth* v. *Ladetto,* 349 Mass. 237, 244-245. See *Commonwealth* v. *Giles, ante,* 1, 18-19, 22. *United States* v. *Youngblood,* 379 F. 2d 365 (2d Cir.). Nothing less than affording defence counsel fair opportunity to examine and evaluate Moore's grand jury testimony could suffice. "The determination of what may be usuful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States,* 384 U.S. 855, 875.

The narrow issue, therefore, is whether the judge, in permitting the defendants merely to call the stenographer, was granting the defendants the equivalent of what they were entitled to and had requested. We think not. The judge repeatedly denied the defendants' requests to examine

Moore's grand jury testimony. When the judge did authorize the defendants to call the stenographer, he expressly refused to make the grand jury minutes available to counsel even though the defendants' particularized need for them had been established. It can hardly be said, therefore, that the judge, in permitting the defendants to call the stenographer, thereby intended that they should be able to accomplish what he had often expressly denied them. The defendants were not required to accept less than that to which they were entitled. Having seasonably saved their exceptions, they should now be entitled to examine Moore's grand jury testimony for purposes of a retrial.

3. We believe there was error in the denial of Connor's motion to quash the indictment which, several days prior to Connor's arrest, was returned against "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown." We recognize that the judge who denied the motion to quash understandably relied upon the holding in *Commonwealth* v. *Gedzium,* 259 Mass. 453. Our opinion is, first, that the *Gedzium* case cannot withstand analysis on the constitutional issue, and second, that the *Gedzium* case is distinguishable from and does not support the case before us.

Under art. 12 of the Declaration of Rights of our Constitution " 'no *person* . . . shall be held to answer for a capital or otherwise infamous crime . . . unless *he* shall have been previously charged on the presentment or indictment of a grand jury.' 2 Kent Cor. 12" (emphasis supplied). *Jones* v. *Robbins,* 8 Gray, 329, 344-345. The fundamental prerequisite to a valid indictment, that the grand jury intend to indict a specific person whose identity is known to them, is immutable. An indictment returned by the grand jury must be "an indictment found in the usual course of proceedings in pursuance of the methods of conducting the deliberations of grand jurors established by generations of

procedure in England and in this Commonwealth." *Commonwealth* v. *Harris,* 231 Mass. 584, 587. *Jones* v. *Robbins,* 8 Gray, 329, 342-343. *Commonwealth* v. *Woodward,* 157 Mass. 516.

Tested by the foregoing constitutional principles, the indictment under which Connor was tried and convicted was fatally defective. The grand jury's averment under oath in the indictment that no better description of the person intended to be indicted was known to them than the name "John Doe" forecloses the possibility that they knew the identity of the person they intended to indict. The name "John Doe" gives no clue to identity. Standing alone it is synonymous with anonymity. The indictment of John Doe is the indictment of anyone. The indictment of anyone is the indictment of no one. The indictment of no one is an indictment in blank. The indictment as returned, therefore, subjected Connor to a public trial before the grand jury had determined in the first instance that probable cause existed to believe that *he* committed the crime charged in the indictment. Because the defect is apparent on the face of the indictment the objection was properly raised by motion to quash. G.L. c. 278, § 17.

We do not believe that G.L. c. 277, § 19, authorizes the procedure followed in Connor's case. We think the statute applies only where the indictment clearly shows that the grand jury intended to indict a particular person whose identity was known to them although his true name may not have been known. See, e.g., *Commonwealth* v. *Dedham,* 16 Mass. 141; *Commonwealth* v. *Lewis,* 1 Met. 151; *Turns* v. *Commonwealth,* 6 Met. 224, 235; *Commonwealth* v. *Butler,* 1 Allen, 4; *Commonwealth* v. *Darcey,* 12 Allen, 539; *Commonwealth* v. *Fredericks,* 119 Mass. 199. To hold that the "John Doe" indictment under which Connor was tried and convicted is authorized by G.L. c. 277, § 19, would effectively nullify the limitations on criminal proceedings con-

tained in G.L. c. 277, § 63. The procedure would permit a grand jury to return an indictment whenever they had probable cause to believe that a crime had been committed without any inquiry into *who* committed the crime. It would no longer suffice that a person who has committed a crime remain undetected for the period of time set forth in G.L. c. 277, § 63. It would also be necessary that the acts constituting the crime likewise be not detected for the prescribed period.

In any event, the failure of the indictment to satisfy the constitutional requirement that the grand jury determine in the first instance that probable cause existed to believe that *Connor* committed the crime charged cannot be cured by any action allegedly authorized by G.L. c. 277, § 19. It is axiomatic that a constitutional guaranty cannot be eradicated by statute. "The legislature may change . . . [the indictment] in *form*, but cannot change the *substance* of its material averments without impinging upon constitutional guarantees" (italics in original). *State* v. *Terry*, 109 Mo. 601, 614.

What we have said with respect to the "John Doe" indictment under which Connor was tried and convicted applies with equal force to the "John Doe" indictment in *Commonwealth* v. *Gedzium*. In the *Gedzium* case, the court felt able to leap the constitutional barrier by the statement that "Such allowance [of the motion to enter the true name of the defendant upon the record] presupposes the finding by the court of all the facts essential thereto to the end that no injustice be done to any defendant" (p. 461). In the case before us, there is no evidence that would justify our indulging in such a statement. The stark reality of the situation is that we have an indictment for murder returned by the grand jury in blank, leaving it to the prosecutor later to identify the person to be charged, and to enter his name, with the acquiescence of the judge, on the record.

Because the "John Doe" indictment under which Connor has been tried was fatally defective, all proceedings taken in reliance upon the indictment are void. To say that a guilty verdict rendered by a petit jury cures the fatal defect in the indictment would destroy the right of every citizen to the interposition of a grand jury in the first instance, guaranteed by art. 12 of the Declaration of Rights. Connor made timely objection to the procedure. Accordingly, in the case against Connor the judgment should be reversed, the verdict set aside, and the indictment quashed.